United States Court of Appeals

for the Second Circuit

APPENDIX

Orig w/ affidavit of mailing

75-1267

B
P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1267

UNITED STATES OF AMERICA,
Appellant,

—against—

GERARD P. TROTTA,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

[redacted] APPENDIX

DAVID G. TRAGER, ESQ.,
United States Attorney for the
Eastern District of New York.
LYON & ERLBAUM, ESQS.,
123-60 83rd Avenue,
Kew Gardens, New York 11415.
Attorneys for the Defendant-Appellee.

PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

D. C. Form No. 100
CRIMINAL DOCKET

74CR 631

NEAHER, J.

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U. S. KORMAN
vs.	
GERARD P. TROTTA	
	For Defendant:
Interference with commerce by extortion	

ABSTRACT OF COSTS	AMOUNT	CASH RECEIVED AND DISBURSED			
		DATE	NAME	RECEIVED	DISBURSED
Fine,		7/10/75	Govt's notice of appeal		
Clerk,					
Marshal,					
Attorney,					
Commissioner's Court,					
Witnesses,					

DATE	PROCEEDINGS
10-31-74	Before Costantino J - Indictment filed.
11-4-74	Copy of pleading notice filed setting case for 11-8-74 for pleading of deft.
11-4-74	Govts Notice of Readiness for Trial filed.
11-4-74	Affidavit of EDWARD R. KORMAN filed.
1/8/74	Before NEAHER,J.- Case called- Adjd to 11/15/74 at 10:00 A.M. for pleading
11/22/74	Before NEAHER,J.- Case called- Adjd with consent of both parties to 11/27/74 at 10:00 A.M.
11/22/74	Notice of motion to dismiss and memorandum in support of motion filed ret. 11/27/74 at 10:00 A.M.
11-27-74	Before Neaher, J - case called -Hearing held on motion to dismiss the indictment - hearing concluded - decision reserved. All papers to be submitted by Dec. 13, 1974.

74CR 631

A 2

DATE	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
1-6-75	Govts Memorandum filed in opposition to the motion to dismiss the Indictment .		
1-14-75	Stenographers transcript filed dated Nov. 27, 1974.		
2-7-75	Defts Reply Memorandum filed in support of motion to dismiss.		
3/18/75	Copy of letter from A.U.S.A. Korman to chambers dated 3/18/75 filed re: response to motion (deft's) to dismiss		
7-2-75	MEANER, J - Memorandum & Order filed granting defts motion to dismiss the Indictment. (order dated June 30, 1975 but received in Clerks Office on July 2, 1975)		
7/10/75	Govt's notice of appeal filed (from above order)		
7/10/75	Docket entries and duplicate of notice of appeal mailed to court of appe		
7/11/75	Record on appeal certified and mailed to court of appeals		
7/17/75	Acknowledgment received from court of appeals for receipt of record		

DGT:ERK:lgc
F.#743,447

A 3

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Weeks, J

- X

UNITED STATES OF AMERICA

SUPERSEDING INDICTMENT

- against -

Cr. No. 74 CR 681
(18 U.S.C., 1951)
November 1, 1974

GERARD P. TROTTA,

Defendant.

- X

THE GRAND JURY CHARGES:

INTRODUCTION

1. At all times relevant herein, William F. Cosulich Associates was a partnership organized under the laws of the State of New York to perform services as consulting engineers. William F. Cosulich Associates provided these services for public bodies and agencies in the State of New York, including the Town of Oyster Bay, Long Island, and other states. Moreover, William F. Cosulich Associates, at all times relevant herein, engaged in interstate commerce and in the purchase and sale of goods and services in interstate commerce and made use of the facilities of interstate commerce.

2. The defendant GERARD P. TROTTA, at all times relevant herein, was Commissioner of Public Works of the Town of Oyster Bay, Long Island. As such, the defendant GERARD P. TROTTA, was "authorized and empowered, subject to the prior approval of the Town Board . . . to retain and employ private engineers, architects and consultants, or firms practicing such profession, for the purposes of (1) preparing designs, plans and estimates of structures or projects of any type and character, (2) rendering assistance and advice in connection with any project, whether defined or proposed and under the supervision of the department of public works; and

(3) [illegible] such other and necessary services as the Commissioner may deem necessary in the administration of the department. (Town of Oyster Bay, Local Law No. 2-1966). Moreover, at all times relevant hereto, contracts were entered into by the Commissioner of Public Works of the Town of Oyster Bay on the Town's behalf, including contracts with William F. Cosulich Associates, pursuant to which the Commissioner of Public Works as the representative of the Town of Oyster Bay, was vested with complete authority to monitor and oversee the performance of the contractor.

3. Accordingly, the defendant, GERARD P. TROTTA, knew reasonably understood by William F. Cosulich Associates, and its members, to have the power to take action which could adversely affect William F. Cosulich Associates in obtaining and performing contracts with the Town of Oyster Bay, Long Island.

COUNT ONE

1. On or about the 25th day of February, 1972, within the Eastern District of New York, the defendant GERARD P. TROTTA did unlawfully attempt to affect commerce and did unlawfully affect commerce as that term is defined in Section 1951(b)(3) of Title 18, United States Code, by knowingly and wilfully demanding and obtaining from William F. Cosulich Associates the sum of Two Thousand Dollars ($2,000.00) for the benefit of the Republican Committee of the Town of Oyster Bay, Long Island, with the consent of William F. Cosulich Associates, and its members, to the aforesaid payment having been induced by the defendant GERARD P. TROTTA under color of official right.

2. The aforesaid conduct of the defendant GERARD P. TROTTA, by depleting the assets of William F. Cosulich Associates, which transacted business in interstate commerce, purchased and sold goods and services in interstate commerce, and made use of the facilities of interstate commerce, had the potential of affecting commerce and did affect commerce as that term is defined by

Title 18, United States Code, Section 1951(b)(3). (Title 18, United States Code, Section 1951).

COUNT TWO

1. On or about the 21st day of July, 1972, within the Eastern District of New York, the defendant GERARD P. TROTTA did unlawfully attempt to affect commerce and did unlawfully affect commerce as that term is defined in Section 1951(b)(3) of Title 18, United States Code, by knowingly and wilfully demanding and obtaining from William F. Cosulich Associates the sum of One Thousand Dollars ($1,000.00) for the benefit of the Republican Committee of the Town of Oyster Bay, Long Island, with the consent of William F. Cosulich Associates, and its members, to the aforesaid payment having been induced by the defendant GERARD P. TROTTA under color of official right.

2. The aforesaid conduct of the defendant GERARD P. TROTTA, by depleting the assets of William F. Cosulich Associates, which transacted business in interstate commerce, purchased and sold goods and services in interstate commerce, and made use of the facilities of interstate commerce, had the potential of affecting commerce and did affect commerce as that term is defined by Title 18, United States Code, Section 1951(b)(3). (Title 18, United States Code, Section 1951).

A TRUE BILL.

FOREMAN

DAVID G. TRAGER
United States Attorney
Eastern District of New York

Oral Argument Requested

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

- against -

GERARD P. TROTTA,

Defendant.

Indictment No. 74 CR 681

Superseding Indictment
No. 74 CR 552

Superseding Indictment
No. 74 CR 126

[ERN]

----------x

S I R :

PLEASE TAKE NOTICE, that defendant, GERARD P. TROTTA, will move this Court on the 27th day of November, 1974, at 10:00 a.m. in the forenoon of that day, or as soon thereafter as counsel may be heard, for an order dismissing the second superseding indictment, indictment number 74 CR 681, upon the several grounds set forth in defendant's brief, which is being served and filed herewith, and defendant prays for such other relief as may be just and proper.

Dated: Kew Gardens, New York
November 22, 1974

Yours, etc.,
LYON AND ERLBAUM
Attorneys for Defendant,
GERARD P. TROTTA
Office & P.O. Address
123-60 83rd Avenue
Kew Gardens, New York 11415
(212) 263-3235

TO: HON. DAVID G. TRAGER
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

A 7

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA

- against -

GERARD P. TROTTA,

Defendant.

Indictment No. 74 CR 681

Superseding Indictment No. 74 CR 552

Superseding Indictment No. 74 CR 126

[ERN]

----------x

STATE OF NEW YORK)
) ss. :
COUNTY OF QUEENS)

WILLIAM M. ERLBAUM, being duly sworn, deposes and says:

I am a member of the firm of LYON AND ERLBAUM, ESQS., attorneys for defendant, GERARD P. TROTTA.

This affidavit is submitted in support of our instant motion to dismiss the second superseding indictment, indictment number 74 CR 681, upon the various grounds set forth in the defendant's brief, which is being served and filed simultaneously herewith.

In the interests of brevity we incorporate by reference the motion papers, previously served and filed herein, which were directed against the previous indictments herein, and we incorporate the arguments advanced orally seeking a dismissal of said indictments.

WHEREFORE, we move for a dismissal of the second superseding indictment, indictment number 74 CR 681, and for such other relief as may be just and proper.

Sworn to before me this

22nd day of November, 1974

New York

WILLIAM M. ERLBAUM

A 8

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

-against-

GERARD P. TROTTA,

Defendant.

Indictment No. 74 CR 661

Superseding Indictment
No. 74 CR 552

Superseding Indictment
No. 74 CR 126

(ERN)

----------x

DEFENDANT'S BRIEF IN SUPPORT OF A MOTION TO DISMISS THE INDICTMENT

LYON AND ERLBAUM
ATTORNEYS FOR DEFENDANT,
GERARD P. TROTTA
Office, P. O. Add. & Tel. No.
123-60 83rd Avenue
Kew Gardens, New York 11415
(212) 263-3235

PRELIMINARY STATEMENT

This brief is submitted to aid the court in connection with defendant's application for an order dismissing the within indictment. The defendant wishes to renew all previous motions made in connection with Indictments No. 74 CR 552 and 74 CR 126. Only the motion to dismiss the within indictment is specifically discussed below.

POINT I

THE SUPERSEDING INDICTMENT IS FATALLY VAGUE AND VIOLATES THE GUARANTEES OF THE FIFTH AND SIXTH AMENDMENTS OF THE CONSTITUTION AND RULE 7(c) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE AND MUST BE DISMISSED.

Defendant Gerard P. Trotta, moves for an order pursuant to Rule 12(b) of the Federal Rules of Criminal Procedure, dismissing both counts of the indictment.

Background of this Indictment.

The within indictment, 74 CR 681, is the third indictment lodged against the defendant in relation to an alleged violation of the so-called Hobbs Act, Title 18 U.S.C. Sec. 1951. The within indictment is a two count indictment. Unlike the first indictment in this case, there is no conspiracy count.

The present indictment is substantially similar to the previous indictment (74 CR 552) except for the now added introduction and statement added to each count that interstate commerce would be affected by a depletion of assets of William F. Cosulich Associates.

As with the previous indictment the present indictment is impermissibly vague and leaves undeliniated just what conduct the defendant is alleged to have done that gives rise to criminality.

The original indictment herein, 74 CR 126, was attacked by the defendant as being impermissibly vague. The Government ultimately joined in our motion to dismiss the indictment and it was dismissed. That indictment contained the utterly unilluminating phrase right out of the words of the statute, to wit: "wrongful use of fear."

The second indictment in this case (which is still outstanding), 74 CR 552, contained less information which was essential to a proper indictment than was contained in the original indictment, 74 CR 126, which the Government for all intents and purposes, has heretofore conceded to be deficient. (See minutes of court proceedings of September 10, 1974). That indictment was superseded by indictment 74 CR 552, and 74 CR 552 was superseded by the present indictment, 74 CR 681. A reading of each count of the within indictment will reveal that both counts are deficient and fail to contain anything remotely resembling "a plain, concise and definite written statement of the essential facts constituting the offense charged."

The defendant respectfully submits that both counts of the indictment are fatally defective on the grounds that (1) the indictment fails to contain "a plain and concise and definite written statement of the essential facts constituting the offense charged, as required by Rule 7(c) and (2) both counts of the indictment violate rights guaranteed under the Fifth Amendment of the Constitution.

As with the previous indictment the present indictment is impermissibly vague and leaves undelineated just what conduct the defendant is alleged to have done that gives rise to criminality.

The original indictment herein, 74 CR 126, was attacked by the defendant as being impermissibly vague. The Government ultimately joined in our motion to dismiss the indictment and it was dismissed. That indictment contained the utterly unilluminating phrase right out of the words of the statute, to wit: "wrongful use of fear."

The second indictment in this case (which is still outstanding), 74 CR 552, contained less information which was essential to a proper indictment than was contained in the original indictment, 74 CR 126 which the Government for all intents and purposes, has heretofore conceded to be deficient. (See minutes of court proceedings of September 10, 1974). That indictment was superseded by Indictment 74 CR 552, and 74 CR 552 was superseded by the present indictment, 74 CR 681. A reading of each count of the within indictment will reveal that both counts are deficient and fail to contain anything remotely resembling "a plain, concise and definite written statement of the essential facts constituting the offense charged."

The defendant respectfully submits that both counts of the indictment are fatally defective on the grounds that (1) the indictment fails to contain "a plain and concise and definite written statement of the essential facts constituting the offense charged, as required by Rule 7(c) and (2) both counts of the indictment violate rights guaranteed under the Fifth Amendment of the Constitution.

1. Both Counts of theIndictment Violate Rule 7(c), Federal Rules of Criminal Procedure.

Federal Rules of Criminal Procedure (F.R.Cr. P.) 7(c) require that an indictment, or any count thereof, to do more than cite the provisions of law which the defendant is alleged to have violated. It must do more, by including "a plain, concice and definite written statement of the essential facts constituting the offense charged." Neither count of the indictment complies with this requirement.

It is well established that the purpose of an indictment is to fully apprise the defendant of the crime with which he is charged so that he may properly prepare his defense. United States v Simmons, 69 U.S. 360 (1877). The vital function of an indictment is to provide "such description of the particular act alleged to have been committed by the accused as will enable him properly to defend against the accusation . . . " Wharton's Criminal Law and Procedure, Section 760 at 553. This principle is derived directly from the Sixth Amendment's guarantee of the right of an accused to "be informed of the nature of the cause of the accusation . . . " Without sufficient information to identify the conduct which the Grand Jury has deemed adequate to support an indictment, an accused is at a material disadvantage in meeting the charge against him. United States v Tomasetta, 429 F. 2d 978 (1st Cir., 1970).

The Supreme Court has uniformly held that an indictment must do more than simply repeat the language of the statute. "It is an elementary principle of criminal pleading, that where the definition of an offense whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the

offense in the same generic terms as in the definition; but it must state the species - it must descend to particulars.'" United States v Cruikshank, 92 U.S. 542, 558. * / An indictment not framed to apprise the defendant with reasonable certainty, of the nature of the accusation against him is defective even though it may follow the language of the statute. United States v Simmons, 96 U.S. 360, 362.

An indictment which charges in the words of the statute does not suffice, "unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished . . ." United States v Carll, 105 U.S. 611. Basic principles of fundamental fairness which are embodied in the modern concepts of pleadings, and specifically under Rule 7(c) of the Federal Rules of Criminal Procedure, require that an indictment which uses the language of the statute in the general description of an offense, must be 'accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense coming under the general description, with which he is charged.'" United States v Hess, 124 U.S. 483. This indictment herein, plainly violates the basic principle that "the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, . . . " United States v Simmons, supra, at 362. The within indictment charges in the language of the statute, but does not state essential facts.

* / Although common law crimes are mentioned in Cruikshank, in the Federal jurisdiction there are no common law crimes. Only crimes as defined by Congress are subject to the jurisdiction of the Federal Government.

(a) THE INDICTMENT

The indictment consists of a three paragraph introduction. The first paragraph introduces William F. Cosulich Associates. It states that William F. Cosulich Associates was a partnership organized under the laws of the State of New York to perform consulting services as engineers; that the said firm provided services for various public bodies including the Town of Oyster Bay and that the firm is alleged to have engaged in interstate commerce and in the purchase and sale of goods in interstate commerce.

The second paragraph introduces the defendant, Gerard P. Trotta. It states that Gerard P. Trotta was the Commissioner of Public Works of the Town of Oyster Bay, Long Island, and, as such, was authorized and empowered to retain and employ engineers in relation to public works. It is alleged in the paragraph that "generally" Mr. Trotta was designated to represent the Town of Oyster Bay and was vested with authority to monitor and oversee the performance of contractors. The use of the word "generally" is telling, in that it typifies the entire nature of this indictment.

Finally, the third paragraph states that the defendant had and was reasonably understood by William F. Cosulich Associates, and its members, to have the power to take action which could adversely effect William F. Cosulich Associates in obtaining and performing contracts for the Town of Oyster Bay, Long Island."

After the three introductory paragraphs the indictment then contains the two substantive counts. Counts one and two are identical in form and vary only in substance as to the dates (Count One,

February 25, 1972, and, Count Two, July 21, 1972) and the sums of money involved (Count One, $2,000, and, Count Two, $1,000). Each count is divided into two paragraphs; the first paragraph of each count alleges that the defendant did "unlawfully" attempt to effect commerce and did "unlawfully" effect commerce as that term is defined in Section 1951(b)(3) of Title 18, United States Code, by knowingly and wilfully demanding and obtaining from William F. Cosulich Associates a set sum of money for the benefit of the Republican Committee for the Town of Oyster Bay Long Island, with the consent of William F. Cosulich Associates, and its members the aforesaid payment having been induced by the defendant, Gerard P. Trotta, "under the color of official right."

The second paragraph of each count alleges that the conduct described in the first paragraph of each count had the potential of effecting and did effect commerce "by depleting the assets of William F. Cosulich Associates, which transacted business in interstate commerce, purchased and sold goods and services in interstate commerce, and made use of the facilities of interstate commerce . . . "

A plain, "common sense" reading of the indictment will readily indicate that the indictment does not state the specific act or acts or conduct that Mr. Trotta is alleged to have performed on February 25, 1972 (and on July 21, 1972) which is in violation of Title 18 U.S. Code Section 1951.

The indictment, at most states that the defendant demanded and obtained from William F. Cosulich Associates sums of money for the benefit of the Republican Committee of the Town of Oyster Bay, Long Island the payment having been induced by the defendant "under the

color of official right." This action was then alleged to have affected interstate commerce in that the assets of William F. Cosulich Associates was thereby depleted. This is hardly sufficient to put the defendant on notice as to what he is specifically accused of. How could one possibly prepare a defense to meet this unknown accusation? The indictment fails to state any identifiable conduct which points to criminality.

The use of the term 'under color of official right' is totally unilluminating. The term "under color of official right" is not self-defining. Such terms can not be used as a substitute for an averment of facts. It does not inform a defendant of what acts he is accused of doing that gives rise to the claim of criminality. Every concept of modern pleading as well as fundamental fairness, calls for a definite statement of facts.

The use of the term 'unlawfully' is equally vague and is but a bald conclusion. To say that a defendant obtained money "unlawfully" is patently insufficient. Guilt depends upon a specific identification of just what the defendant did that was alleged "unlawful."

The use of generic terms such as "under the color of official right," or 'unlawfully' cannot be used as a substitute for particulars. United States v Cruikshank, supra., at 558.

The very core of criminality under 18 U.S.C. Sec.1951, is the taking of property from another not due him induced under the color of official right. By stating that the inducement was "under the color of official right' does not inform a defendant of the precice conduct for which he is charged and is merely repetition of the

language of the statute. Simply stated, the term "under the color of official right" does not specifically identify the conduct which the defendant is accused of doing which is in violation of 18 U.S.C. Section 1951. An indictment must allege "facts" and cannot rely upon the "boiler plate" language of a statute.

Succinctly put, the indictment fails to specify any particular respect in which Mr. Trotta's conduct was "unlawful. Common sense indicates that a statement of the "essential facts" constituting the offense (Rule 7(c)) of extortion must make reference to what the defendant is specifically alleged to have done in order to have "extorted" the funds.

The vice which inheres in the failure of this indictment to specify what the "unlawful" conduct was, constitutes a violation of the basic principle "that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him . . . " United States v Simmons, supra. This cryptic form of indictment compels Mr. Trotta to go to trial with the chief issue wholly undefined. It makes it possible for the indictment to have rested on one basis in the Grand Jury and for a verdict by the jury at trial to rest on another basis. It gives the prosecution a free hand to fill in the gaps of proof by surmise or conjecture. The prosecution is left free to roam at large - to shift its theory of criminality so as to take advantage of each passing vicissitute of the trial. Russell v United States 369 U.S. 749, 768.

A bill of particulars can not cure the defect of this indictment. The rule has long been settled that a bill of particulars cannot save an invalid indictment. Russell v United States, supra, at 369. See

also United States v Norris, 281 U.S. 619, United States v Lattimore, 94 App. D.C. 268, 215 F. 2d 847 Babb v United States, 218 F. 2d 538 (5th Cir.).

The prosecutor's obtaining of this vague second superseding indictment has conferred upon himself by his own bootstraps, the total freedom to "roam at large . . . " United States v Agone, 302 F. Supp. 1258 1261 (SDNY, 1969).

All the above-mentioned principles, not the least of which is that of fundamental fairness, call for the within indictment to state precicely just what act or acts the defendant, Gerard P. Trotta, is alleged to have done. The first paragraph of each count of the indictment should not have ended where they did with the hollow statement that the payments were "induced by the defendant Gerard P. Trotta under the color of official right," but should have continued with a "plain, concice and definite written statement of facts" (F.R.C.P., 7(a)) alleging that the payments were induced by the defendant Gerard P. Trotta, under the color of official right in that he did such and such, i.e., the essential facts constituting the offense charged).

(b) Hobbs Act Prosecution Alleging Extortion Induced Under Color of Official Right.

The case of United States of America v Staszcuk, __ F. 2d __ (7th Cir. decided September 10 1974), is the first prosecution reported under Section 1951 to rely solely on subdivision b(2)'s definition of extortion as "obtaining of property from another, with his consent, induced . . . under color of official right." All other reported Hobbs Act cases charging extortion relied on the wrongful use of actual or

threatened force, violence, or fear" section of the definition. The only exception is United States v Kenny 462 F. 2d 1205 (3rd Cir.), cert. denied 409 U.S. 914 (1972), in which defendants were charged with extortion through wrongful use of fear or under color of official right.

The indictment in United States v Staszcuk, supra, is in marked contrast to the within indictment. The indictment in Staszcuk picks up exactly at the point where this indictment ends by supplying the defendant with the essential facts of the allegations. There, the indictment stated that the property was obtained from one Allen with is consent, being induced under the color of official right; the indictment then states in detail. "This payment was made because Allen believed and feared that he would be unable to procure a zoning charge on property located at 79th Street between Knox and Kilpatrick Avenues in the Thirteenth Ward of Chicago, unless he compensated defendant to refrain from objecting to such a change as a member of the Chicago City Council" (Page 25 of the oral argument of October 4, 1974). The Staszcuk indictment tells the defendant what he is charged with and what he did. It provides the nexus between the money obtained and the actions of the defendant. The within indictment fails to spell out the nature of the unlawful transaction, i.e., that which was done or said, which would enable one to determine, from the face of the indictment and not by extringent means, that there was, in fact, anything unlawful about the obtaining of money 'under the color of official right.' The Staszcuk indictment clearly spells out the quid pro quo - money was extorted under the specific identifiable threat that if the money was not paid, there

would be no zoning change. This is in marked contrast to the within indictment which leaves each essential element to guess work, surmise and inference.

To uphold this indictment, not only would it be a flagrant violation of Rule 7(c) F.R.C.P., but would sanction a form of criminality that was never envisioned under the Hobbs Act. It appears that the Government's position (see oral argument of October 4, 1974, and Memorandum of United States in Opposition to Motion To Dismiss, 74 CR 552), is that if any public official demands or "solicits" money from a citizen and that citizen could possibly be affected by that official than the official has violated Section 1951 and is exposing himself to a twenty-year prison term (provided, of course, that there is Federal jurisdiction). The Government's position is clearly untenable and contrary to all established precedents.

The Hobbs Act is a 'anti-racketeering' statute. It was derived from the original anti-racketing act of 1934. (48 Stat. 979-80 (1934). The original statute was enacted after the Senate Committee on Interstate Commerce which became known as the Copeland Committee, undertook an investigation of 'rackets' and 'racketeering". The statute was directed against violence and coercion in connection with interstate commerce.

The present statute, the Hobbs Act, (Congressman Hobbs of Alabama was the sponsor of the bill), was enacted in 1945. The Act grew out of a decision of the Supreme Court, U.S. v Local 807, 315 U.S. 521 (1942) which narrowly construed the Act.

The dangers inherent in the Government's theory are quite apparent.

Every holder of a public office would be placed in fear by the threat of an indictment (which carries a twenty year maximum penalty), each and every time he or she solicits funds on behalf of any charitable or philanthropic cause. It is rare the public official who is not asked by at least one charitable organization to contribute his time and, more importantly, his good name to a needy fund raising project. People in public life, elected officials, judges, public administrators, policemen etc., invariably wear many hats. The citizenry expect and demand that public officials lend a supporting hand in the community in which they serve. To state that no public official can solicit for funds for a charitable or political cause from his constituancy is the very anthesis of our democratic system. Clearly, this is not the intent of Congress when it enacted Section 1951 of Title 18 United States Code.

The Government's theory presents several nagging problems: Are the policemen who solocit funds for the Police Atheletic League, or the mayor of your city who appeal each year to us New Yorkers for the United Fund, to be indicted for extortion under the Hobbs Act? How would an incumbent office holder raise funds for reelection or even seek a higher elective post without running the risk of a twenty year prison term? Is the Government asking that all public officials, from policemen to judges, become "second class citizens" and live in a vaccum? Invariably, all of us wear several different hats in life and function in various roles. To carry the Government's argument

to its logical end only results in absurdity. To take but one example: A public official who appears on television and appeals for donations from his constituents and, for example, the starving children of drought stricken Africa, could, with every contribution received be guilty of extortion. This is so even though the donor might remain anonymous. Manifestly, this was not the intent of Congress in passing the 'anti-racketeering' Hobbs Act.

The Government is attempting to create per se (strict) liability and is attempting to create an instrument for oppression. The interpretation attempted by the Government would create a tremendous capacity for mischief and would undoubtedly have a startling and chilling effect upon the entire American political process. It would not be long before public officials would be in fear of lending their hand to any cause whether it be the Red Cross, The March of Dimes or the political party of their choice.

The holding in United States v Sutter, 160 F. 2d 754 (7th Cir., 1947) was a specific rejection of the Government's theory. */ In Sutter, an employee of the United States Government in the Gauge Procurement Section of the Division of the War Department, solicited funds from various manufacturers of gauges for various charitable funds including a fund for returning injured Veterans and a Christmas fund for office employees. There was no evidence that the defendant, when he solicited the funds, took any advantage of his position as

*/ Sutter was prosecuted under Sec. 171 of Title 18 U.S.C. 'Extortion by officers or employees of the United States.'

an employee of the United States in order to obtain such funds. The funds were 'voluntarily' contributed.

The court held that there was no violation of 171 of Title 18 United States Code (extortion) since there was no proof that the defendant took advantage of his position as an employee. No promises of any kind were shown. Hood v Star, 156 Ark. 92, 245 S.W. 176 (1922); LaTour v Stone 139 Fla. 681, 190 So. 704 (1939); Collier v State, 55 Ala. 125 (1876).

The courts thus recognize that a public office holder in fact does wear several hats and does act in several capacities. It is only when payments are made to a defendant to influence his exercise of official power is there a violation of the statute. In the case at bar, there is no nexus alleged (cause and effect relationship) between the money allegedly paid and some act on behalf of the defendant that would leave Cosulich with the distinct belief that if he did not make the payment, his position as a consulting engineer would be adversely affected.

2. The Indictment Herein Plainly Violates the Fundamental Rights Guaranteed Under the Fifth Amendment.

The Fifth Amendment of the Constitution provides that "no person shall be held to answer for a capital, or otherwise infamous crime unless on a presentation of an indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the malitia, when in actual service or war or public dangers; . . . "

The Federal system views the Grand Jury as an important element

of the criminal process. It and it alone, is competent to charge an accused with a crime in violation of Section 1951 of Title 18 of the United States Code.

On an indictment as vague as that at bar, it is possible for the prosecutor to obtain a conviction based wholly on evidence of an incident completely divorced from that which the Grand Jury based its indictment. The prosecution may not have the power to "roam at large" in this fashion, Russell v United States, supra, No. 2 at 768-771. Only/a Grand Jury can determine whether a person shall be held to answer in a criminal trial of obstructing, delaying, affecting, etc., the movement of articles and commodities in interstate commerce by/extortion under the color of official right. A Grand Jury, in order to make the ultimate determination, must necessarily determine what the defendant did that was "unlawful." To allow the prosecutor or the court to make a subsequent guess as to what was in the mind of the Grand Jury at the time it returned the indictment would deprive the defendant of a basic protection which the guarantee of the intervention of the Grand Jury was designed to secure. For a defendant would then be convicted on the basis of facts not found by and perhaps not even presented to the Grand Jury which indicted him. Russell v United States, supra, at 770.

It does not lie within the province of the prosecution to change the theory of the indictment to suit its own notion of what the Grand Jury had in mind. See and compare Ex parte-Baine, 121 U.S. 1; Stirone v United States 361 U.S. 212.

It has long been recognized that there is an important corollary purpose to be served by the requirement of an indictment set out the specific offense, coming under the general description, with which the defendant is charged. This purpose, as defined in United States v Cruikshank, 92 U.S. 542, 558, is "to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had." Another reason for the requirement that every ingredient of an offense charged must be clearly and accurately alleged in the indictment, is to enable the court to decide whether the facts alleged are sufficient in law to with stand a motion to dismiss the indictment, or to support a conviction in the event that one should be had. United States v Lamont, 18 F.R.D. 27, 31 (DCNY).

Another purpose served by the indictment is to inform the trial judge what the case involves, so that, as he presides and is called upon to make rulings of all sorts, he will be able to do so intelligently. (Russell v United States, supra, at 768, Footnote 15).

CONCLUSION.

Each count of the within indictment is fatally defective by its failure to apprise the defendant, with reasonable certainty, of the nature of the accusation against him. The defendant is called upon to defend against an accusation, without knowing what exactly he is accused of doing. The indictment mirrors the words of the statute which is cloaked in general terms. There are no identifiable

facts which in any way reflect criminality. It is difficult to imagine a case in which an indictment's insufficiency resulted so clearly in the indictment's failure to fulfill its primary office, to wit, to inform the defendant of the nature of the accusation against him.

POINT II

THE INDICTMENT FAILS TO ALLEGE A SUFFICIENT BASES TO SUSTAIN FEDERAL JURISDICTION.

To satisfy the jurisdictional element of the crime of "extortion" under Section 1951, there must be an allegation that the "extortion" had an effect on interstate commerce. The Government has alleged in the second paragraph of each count, that the aforementioned conduct of the defendant, Gerard P. Trotta, affected interstate commerce "by depleting the assets of William F. Cosulich Associates," which transacted business, bought and sold goods, etc., in interstate commerce. This statement is insufficient to give rise to Federal jurisdiction.

The statement depletion of funds" is wholly unedifying and meaningless. When someone gives something away, they necessarily have less than they previously had, and in that sense, there is, of course, "depletion of funds." But the mere fact that someone has parted with something does not mean that their ability to function and carry on business as before would be affected. The money that was alleged to have been extorted might have depleted the funds

(i.e., they had less funds) of William F. Cosulich Associates but it might not have had even "a de minimus effect" on interstate commerce. The money might have been from a fund specifically earmarked for philanthropic purposes or the funds might have been taken from profits which would have been distributed to the partners of the firm (and would not effect the partnership's affairs). The indictment does not state where the funds came from and how it affected commerce; one can only guess.

The allegation contained in this indictment is insufficient to sustain Federal jurisdiction. The indictment fails to state how or why or in what manner interstate commerce will be affected, if at all, by the depletion of funds. Only by guess work and inference could one conclude that interstate commerce would be affected by a mere depletion of funds.

The Government is apparently relying on the case of United States v Augello, 451 F. 2d 1167 (2d Cir.) - (Page 45 of Oral Argument of October 4, 1974).

In Augello, the victim was induced by threats of physical violence to make money payments to appellant in return for protection against interference in operating his restaurant. The money extorted, in one instance, came directly from the store's cash register; the money was obviously necessary for the effective operation of the store. In the case at bar, unlike the situation in Augello, the exact source of funds is unknown and the nexus between the alleged

giving of funds and the operation of Cosulich Associates is missing.

CONCLUSION

The within indictment must be dismissed due to a failure to allege any effect upon interstate commerce.

Respectfully submitted,

LYON AND ERLBAUM,
ATTORNEYS FOR DEFENDANT, GERARD P. TROTTA.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - -x

UNITED STATES OF AMERICA

-against-

No. 74 CR 681

GERARD P. TROTTA,

Defendant.

- - - - - - - - - - - - - - - - - - -x

MEMORANDUM OF THE UNITED STATES IN OPPOSITION TO THE MOTION TO DISMISS THE INDICTMENT

PRELIMINARY STATEMENT

This memorandum is submitted in response to the motion of the defendant GERARD P. TROTTA to dismiss the indictment on the grounds (1) that it "is fatally vague" (Memo. p. 1); (2) that "it sanction[s] a form of criminality that was never envisioned under the Hobbs Act" (Memo. p. 11); and (3) that it fails "to allege a sufficient basis to sustain federal jurisdiction (Memo. p. 17). These claims are without merit.

I. The Indictment is Not Fatally Vague

The essence of the charge against the defendant is that on the dates specified in the indictment he unlawfully

attempted to affect commerce, and did affect commerce, as that term is defined in Section 1951(b)(3) of Title 18, United States Code, "by wilfully demanding and obtaining" from William F. Cosulich Associates the sums specified in the indictment with consent of William F. Cosulich Associates, and its members, to the aforesaid payments having been induced by the defendant "under color of official right."

The defendant alleges that the term "under color of official right" is fatally vague. This portion of the Hobbs Act, however, has a well understood, and legally defined meaning, which goes back to the common law. United States v. Kenney, 462 F.2d 1205, 1229 (C.A. 3), certiorari denied, 409 U.S. 914. The essence of the offense is the abuse of office for private gain; for it was well understood at common law, and by Congress, that a demand for monies made by one holding a public office, from a citizen who could be affected adversely by the manner in which the public officer exercised his official functions, is inherently coercive. Thus, as the Court of Appeals observed in United States v. Sutter, 160 F.2d 754, 756, "[i]n the common law offense of extortion, color of public office took the place of the force, threats or

pressure implied in the ordinary meaning and understanding of the term." Accord: United States v. Kenney, supra, 463 F.2d at 1229. It is "the office which provide[s] the duress which render[s] the acceptance of money by [a public official] extortion under color of official right." Slip. op. pp. 11-12). United States v. Staszuk, ___ F. 2d ___, No. 73-1869 (C.A. 7, September 7, 1974, concurring op. of Campbell, J.).

Accordingly, it is not surprising that indictments which charged defendants with extortion, and which simply followed the definition of that word in the language of the Hobbs Act, have been sustained repeatedly. So, for example, in United States v. Palmiotti, 254 F.2d 491 (C.A. 2, 1958), the court of appeals sustained an indictment charging merely that the defendant "did attempt to obtain [from a named victim] a sum of money, with its consent, induced by wrongful use of threatened force or fear." 1/ Accord: Esperti v. United States, 406 F.2d 148, 149 (C.A. 5, 1969), certiorari denied, 395 U.S. 938 (1969); United States v. Addonizio,

---

1/ This indictment, although it did not further define the term "wrongful use" of threatened force or fear, has been previously cited by the defendant as a model of a "proper Hobbs Act indictment" (Memo. [74 Cr. 126] p. 8).

313 F. Supp. 486, 496 (D.C. N.J., 1970), affirmed 451 F.2d 49 (C.A. 3, 1971), certiorari denied, 405 U.S. 936 (1972); see, also, United States v. Kenney, 462 F.2d 1205, 1213 (C.A. 3, 1972), certiorari denied, 409 U.S. 914 (1973).

Moreover, contrary to defendant's claim, the indictment here does not "fail to spell out the nature of the unlawful transaction, i.e., that which was done or said, which would enable one to determine, from the face of the indictment and not by extringent means, that there was, in fact, anything unlawful about the obtaining of money 'under the color of official right'." (Memo. p. 10). Nor is it possible under this indictment "for the prosecutor to obtain a conviction based wholly on evidence of an incident completely divorced from that which the Grand Jury based its indictment." (Memo. p. 15). For this indictment sets out the grand jury's finding that the defendant held an official position through which he could have directly and adversely affected William F. Cosulich Associates; that William F. Cosulich Associates reasonably understood him to possess such power, and that the defendant "demanded and obtained" specified sums of money frcm William F.

Cosulich Associates on the dates specified in the indictment. The presence of these allegations on the face of the indictment plainly insures "that the defendant [will] not be tried upon a theory of evidence which was not fairly embraced in the facts upon which the grand jury based its charges." United States v. Silverman, supra, 430 F.2d at 111. Here the face of the indictment "presents evidence which assures us that [the] essential elements of [this offense] were presented to the jury and deliberated upon by them in returning the indictment." (Id).

Moreover, it must be emphasized, as the Supreme Court has observed, that "[t]he sufficiency of the indictment is not a question whether it could have been more definite and certain" United States v. Debrow, 346 U.S. 374, 378 (1953) [emphasis added]. This is so because "[t]he pleading provisions of the criminal rules cannot be viewed in isolation, but must be considered part of a coordinated system for the administration of criminal justice. Accordingly if the indictment is otherwise sufficient, the court

can take into account that particular facts needed in particular cases are obtainable by bill of particulars or discovery." Wright, Federal Practice and Procedure, (Criminal) § 126, p. 252.

The cases upon which defendant relies are plainly distinguishable from the instant case, and one United States v. Simmons, 69 U.S. 360 even supports our position.

a. United States v. Simmons, 96 U.S. 360, was concerned with an indictment involving illegal distilling. Revised Statutes §3266 made it an offense to distill spirits on premises where vinegar "is" manufactured. One count of the indictment charged the defendant with causing equipment on premises where vinegar "was" manufactured to be used for distilling. This count was dismissed for its failure (1) to identify the person who had so used the equipment or to allege that his identity was unknown to

the grand jurors; and (2) to allege that the distilling and manufacture of vinegar were coincidental, as required by the statute. 2/ What is more significant from the standpoint of the present cases is that in sustaining another count of the indictment charging the defendant with engaging in the business of distilling "with the intent to defraud the United States of the tax" on the spirits (R. S. § 3281), the Court held that it was not necessary to allege "the particular means by which the United States was to be defrauded of the tax." Id., at 364.

b. United States v. Cruikshank, 92 U. S. 542, involved an indictment under the Enforcement Act of 1870 (16 Stat. 140) making it a felony to conspire to prevent

---

2/ The Court stated (id., at 362):

"Where the offence is purely statutory ... it is, 'as a general rule, sufficient in the indictment to charge the defendant with acts coming fully within the statutory description, in the substantial words of the statute, without any further expansion of the matter.' 1 Bishop, Crim. Proc., sect. 611, and authorities there cited. But to this general rule there is the qualification, fundamental in the law of criminal procedure, that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him....An indictment not so framed is defective, although it may follow the language of the statute." (Emphasis added)

any person from exercising and enjoying "any right or privilege granted or secured to him by the Constitution or laws of the United States." Most of the counts were dismissed on the ground that they stated no federal offense whatever. The remainder were held inadequate from the [illegible] in that they simply alleged a [illegible] enjoying [illegible] Constitution and [illegible] otherwise [illegible] that these opaque [illegible] indictment that the indict[illegible] descend[illegible]." Id., at 558. Indeed, the Court observed: "Regardless of the view we take of these counts, the question [illegible] it is enough, in general, to describe a statutory offence in the language of the statute, but whether the offence has here been described at all." Id., at 557. (Emphasis supplied.)

United States v. Carll, 105 U.S. 611, held no more than that an indictment charging forgery was insufficient for failure to allege scienter, which, though not expressly required by the statute, the Court found to be a necessary element of the crime. Hence a charge in the statutory language would not suffice. -/

/ The discussion of the preceding three cases has been taken almost verbatim from Mr. Justice Harlan's dissenting opinion in Russell v. United States, 369 U.S. 749, 785-786 (1961). The pressure of time, and our inability to improve on his discussion, made paraphrasing inappropriate. We discuss above, infra pp. 8-9, why we believe the majority opinion in Russell is inapposite here.

d. Finally in Russell v. United States, 369 U.S. 749 (1961), the indictment charged that the defendants, who were summoned to testify before a committee of [illegible], refused to answer any questions "pertinent to the question under inquiry". The indictment, however, failed to identify the subject under inquiry by the Committee and [illegible] to determine whether or how the questions were in fact "pertinent." The Supreme Court held that this indictment was inadequate because (764, 766):

> "Where guilt depends so crucially upon such a specific identification of fact, our cases have uniformly held that an indictment must do more than simply repeat the language of the criminal statute."
>
> * * *
>
> "A cryptic form of indictment in cases of this kind requires the defendant to go to trial with the chief issue undefined. It enables his conviction to rest on one point and the affirmance of the conviction to rest on another. It gives the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture. *** And the unfairness and uncertainty which have characteristically infected criminal proceedings under this statute which were based upon indictments which failed to specify the subject under inquiry are illustrated by the cases in this Court we have already discussed. The same uncertainty and unfairness are underscored by the records of the cases now before us."

Here, on the other hand, we do not deal with the absence of any "specific identification of fact." All of the crucial facts are alleged; (1) the defendant's official position; (2) his ability to take official action adversely affecting the victim; (3) the victim's awareness of that power; and (4) his demand for, and receipt of, monies for the victim on the dates alleged. None of the dangers which the Russell indictment presented are present here.

II. The Indictment Plainly States A Violation of the Hobbs Act

The defendant argues that if this indictment is sustained, sanction would be given to "a form of criminality that was never envisioned under the Hobbs Act" (Memo. p. 11). This argument is based on the position attributed to the United States that "if any public official demands or solicits money from a citizen and that citizen could possibly be affected by that official than that official has violated Section 1951 ***." This argument is based on a misinterpretation of the position of the United States and the issue raised here.

First, it was never our position that any time a public official solicits money from a citizen and that

citizen "could possibly be affected by that official than that official has violated Section 1951." And it is no accident that the defendant omits any page reference to the transcript of the argument of October 4, 1974 which is cited as the source of the position attributed bo the United States. In fact, it was made clear during the argument that our position was that a demand for monies made by someone holding a public office from another person who could "adversely and directly be affected" by the manner in which the public official exercised his powers constituted extortion under color of official right. (Tr. 22-23).

Second, what is at issue here is the facial sufficiency of the indictment, and not the previously stated position of the United States in another case. And, without repeating what was said earlier, it is plain that this indictment does state an offense.

Moreover, going beyond the face of the indictment, this is not a case of a public official who "solicit[s] funds for a charitable or political cause from his constituency"; it is not the case of a mayor "who appeals each year to us New Yorkers for the United Fund," and it is not the case of "a public official who appears

on television and appeals for donations from his constituents and, for example, the starving children of drought stricken Africa" (Memo., p. 12-13). On the contrary, here the evidence will show that the defendant, who was lacking totally in the technical qualifications necessary to perform theduties of the public office he held, was appointed to it solely on the recommendation of the Republican Committee of the Town of Oyster Bay; that on assuming his position, he sought to repay that body for the appointment by demanding political contributions from a business which was seeking to obtain contracts from the Town of Oyster Bay; that the defendant advised the aforesaid business, William F. Cosulich Associates, that in effect his public office had been dedicated to raising funds for the Republican Party of Oyster Bay; and that, because the defendant "had and was reasonably understood by William F. Cosulich Associates, and its members, to have the power to take action which could adversely affect William F. Cosulich Associates in obtaining and performing contracts with the Town of Oyster Bay, Long Island" (Ind. ¶3), it made contributions which it otherwise would not have made but for the wrongful use of the defendant's public office.

This kind of abuse of public office, this corruption of a public trust, this none too subtle kind of extortion, is precisely the kind of conduct at which the Hobbs Act was aimed. And, it is ludicrous to suggest, as the defendant does, that a successful prosecution here would put public officials "in fear of lending their hand to any cause whether it be the Red Cross, The March of Dimes or the political party of their choice"(Memo. p. 13).[3/]

United States v. Sutter, 160 F.2d 754 (C.A.7, 1947) did not, as defendant suggests, mark "a specific rejection of the Government's theory." On the contrary, that case is not only distinguishable from the present case, but its reasoning supports our position.

There the defendant, who solicited charitable

3/ The defendant apparently concedes that, if he demanded the monies here at issue for himself rather than for the Republican Committee of the Town of Oyster Ba[illegible], it clearly would violate the Hobbs Act. But it is settled law that the Hobbs Act is violated without regard to whether the victim pays tribute to the extortioner or to a third person. United States v. Green, 350 U.S. 415 (1956); United States v. Sweeney, 262 F.2d 273 (C.A. 3); United States v. Provenzano, 334 F.2d 678 (C.A. 3, 1964), certiorari denied, 379 U.S. 947 (1963); United States v. Jacobs, 451 F.2d 530 (C.A. 5, 1971), certiorari denied, 405 U.S. 955 (1972).

contributions from people who did business with the branch of government by which he was employed (and pocketed the funds himself), was charged with violating a statute which provided (160 F.2d 755, n.1):

> "Every officer, clerk, agent, or employee of the United States, and every person representing himself to be or assuming to act as such officer, clerk, agent, or employee, who, under color of his office, clerkship, agency, or employment, or under color of his pretended or assumed office, clerkship, agency, or employment, is guilty of extortion, and every person who shall attempt any act which if performed would make him guilty of extortion, shall be fined not more than $500 or imprisoned not more than one year, or both."

There the court of appeals held that this statute (unlike the Hobbs Act) did not define extortion in the terms known to the common laws (160 F. 2d 756):

> "Congress did not see fit to define extortion in the terms known to the common law. It said that if an employee under color of his office is guilty of extortion, he shall be punished. Therefore, extortion is used in its common, ordinary sense as distinguished from the sense in which it was known at common law."

The court of appeals continued (Id):

> "If the statute in question had defined extortion as it was known at common law, it would have been sufficient if it had provided: 'An employee of the United States who under the color of his office receives money or anything of value to which he is not entitled shall be guilty of extortion.' In the common law offense of extortion, color of public office took the place of the force, threats, or pressure implied in the ordinary meaning and understanding of the word extortion. The instant statute requires more.

> It does more than substitute color of office for fear, threats, or pressure. The use of official position must be coupled with extortion. Under this statute, a Federal employee is guilty only if he uses his office to place another under compulsion of fear, force, or the undue exercise of power, so that such person parts with something of value unwillingly and involuntarily. It is the oppressive use of official position that is the essence of this offense. Official acts must be committed which cause another to act by reason of the pressure therefrom and not of his own volition."

Applying that test to the case before it, the court of appeals concluded (160 F.2d 756-757):

> "In the instant case the contributors not only testified that they contributed freely and voluntarily, but they said that they would not have contributed if they had known the defendant was going to keep the money, which seems to us the antithesis of extortion.

The present case, of course, involves a statute which quite plainly codifies the common law definition of extortion, and which the court of appeals held would have been violated by the conduct in United States v. Sutton, supra. Moreover, unlike United States v. Sutton, the "contributor" here will not testify that he contributed freely and voluntarily; on the contrary, its members will testify that they agreed to the contribution solely because it was demanded by a public official who "had and was reasonably understood *** to have the power to take action which could adversely affect William F.

Cosulich Associates in obtaining and performing contracts with the Town of Oyster Bay, Long Island."

Accordingly, it is plain that defendant's contention, that the conduct alleged here does not violate the Hobbs Act is frivolous.

III. The Indictment Alleges A Sufficient Basis to Sustain Federal Jurisdiction

The indictment here alleges that the aforedescribed "conduct of the defendant GERARD P. TROTTA, by depleting the assets of William F. Cosulich Associates, which transacted business in interstate commerce, purchased and sold goods and services in interstate commerce, and made use of the facilities of interstate commerce, had the potential of affecting commerce and did affect commerce as that term is defined by Title 18, United States Code, Section 1951(b)(3)."

This allegation is more than sufficient to sustain federal jurisdiction. Particularly apposite here is United States v. Augello, 451 F.2d 1167 (C.A. 2, 1971), certiorari denied, 405 U.S. 1070 (1972), where it was conceded that, because the extortionate scheme was promptly reported to law enforcement authorities, the conduct of the victimized business enterprise was not

A 45

affected "in a way demonstrably interfering with interstate commerce" (451 F.2d 1169). In sustaining the conviction of the defendant despite this fact, the court [illegible]:

> [illegible] power of Congress under [illegible] Katzenbach v. McClung, [illegible] 377, 13 L.Ed.2d [illegible] ment in the Hobbs [illegible] ates, 361 U.S. 212, [illegible] Ed.2d 252 (1960), it [illegible] "in any way or degree," 18 U.S.C. § [illegible](a), affects commerce, though its effect be merely potential or subtle. United States v. Tropiano, 418 F.2d 1069, 1076-1077 (2d Cir. 1969), cert. denied, Grasso v. United States, 397 U.S. 1021, 90 S.Ct. 1258, 25 L.Ed.2d 530 (1970); Hulahan v. United States, 214 F.2d 441, 445 (8 Cir.), cert. denied, 348 U.S. 856, 75 S.Ct. 81, 99 L.Ed. 675 (1954). Here, depletion of Happy-Burger's resources, which by itself may impair the efficient conduct of its business sufficiently to affect commerce. United States v. Provenzano, 334 F.2d 678, 692 (3 Cir.), cert. denied, 379 U.S. 947,85 S.Ct. 440, 13 L.Ed.2d 544 (1964), was shown at the very least by the September 5, 1968 payment taken directly from Happy-Burger's cash register. We are therefore persuaded that the charges in this indictment provided a proper basis to invoke the Hobbs Act."

Here, the indictment not only tracks the language of the Hobbs Act, but it particularizes the effect of defendant's conduct by alleging that the assets of William F. Cosulich Associates, which did business locally and out of state, were depleted. Under United States v. Augello, that allegation, if proven at trial, is sufficient without more, to establish federal jurisdiction.

The defendant's attempt to distinguish Augello from this case can be described charitably as feeble. Thus defendant alleges (Memo. p. 18-19):

> "In Augello, the victim was induced by threats of physical violence to make money payments to appellant in return for protection against interference in operating his restaurant. The money extorted, in one instance, came directly from the store's cash register; the money was obviously necessary for the effective operation of the store. In the case at bar, unlike the situation in Augello, the exact source of funds is unknown and the nexus between the alleged giving of funds and the operation of Cosulich Associates is missing."

This argument goes only to the proof to be adduced in support of allegations which are facially sufficient. Moreover, the course of the funds paid in this case is not "unknown." The checks, copies of which have been provided to the defendant, show that the extortion money here came from the partnership checking account. Surely the defendant is not suggesting that Augello turned on the fact that the money came from a cash register rather than a checking account.

CONCLUSION

For all of the foregoing reasons, the motion to

dismiss the indictment should be denied.

Respectfully submitted,

DAVID G. TRAGER
United States Attorney
Eastern District of New York

EDWARD R. KORMAN,
Chief Assistant United States Attorney,
(Of Counsel)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

-against-

GERARD P. TROTTA,

Defendant.

----------x

Indictment No. 74 Cr. 681
superceding Indictment
No. 74 Cr 552
superceding Indictment
No. 74 Cr 126
(ERN)

DEFENDANT'S REPLY MEMORANDUM OF LAW IN SUPPORT OF A MOTION TO DISMISS THE INDICTMENT

LYON AND ERLBAUM
Attorneys for Defendant
Office & P. O. Address
123-60 83rd Avenue
Kew Gardens, N. Y. 11415
(212) 263-3235

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

-against-

GERARD P. TROTTA,

Defendant.

----------x

PRELIMINARY STATEMENT

This brief is submitted in a reply to the government's "Memorandum of the United States in Opposition to the Motion to Dismiss the Indictment", which was submitted in answer to the defendant's motion to dismiss the indictment.

POINT I (answering government's Point I)

THE INDICTMENT IS FATALLY VAGUE AND FAILS TO IDENTIFY THE ACT WHICH THE DEFENDANT IS ACCUSED OF DOING WHICH IS IN VIOLATION OF 18 U.S.C. SECTION 1951. THE GOVERNMENT HAS FAILED TO CITE A SINGLE CASE WHICH HAS UPHELD AN INDICTMENT AS VAGUE AS THE ONE AT BAR.

Succinctly stated, it is the defendant's position, that the indictment fails to specify any particular respect in which Mr. Trotta's conduct was "unlawful". The use of the term "under color of official right" does not identify the act which the defendant is accused of doing which is violative of the Hobbs Act. Our position is fully in accord with a common sense reading of the indictment. Rule 7(c) of the Federal Rules of Criminal Procedure requires that an indictment contain "a plain, concise

and definite written statement of the essential facts constituting the offense charged." The within indictment utterly fails to specify what act of the defendant, Gerard P. Trotta, constitutes his alleged misbehavior. Putting aside all hypertechnical argument by the government, even without a Rule 7(c), common sense alone dictates that a statement of the "essential facts" constituting the offense of extortion must make reference to what defendant is specifically alleged to have done in order to have "extorted" the funds.

The cases cited by the defendant in his original brief (United States v. Simmons, 96 U.S. 360; United States v. Cruikshank, 92 U.S. 542; United States v. Carll, 105 U.S. 611; Russell v. United States, 369 U.S. 749) which the government attempted to distinguish on their facts, were cited by the defendant for the general principles which they eloquently set forth. While those cases are obviously distinguishable on their facts from the case at bar, the case of United States v. Staszcuk, 502 F2d 785 (7th Cir., 1974) is factually relevant and is a case which the government fails to address itself to. A review of the indictment in Staszcuk readily explains the government's silence. The indictment in Staszcuk carries on at the exact point where this indictment ends and supplies the defendant with a plain, concise and definite written statement of the essential facts constituting the offense charged. Instead of resorting to guesswork, surmise and conjecture - the best that can be done with this indictment - the indictment in Staszcuk clearly sets forth the "quid pro quo" and tells that defendant that he was accused of extorting money under the threat that if the money was not paid, there would be no zoning change.

The cases cited by the government (Esperti v. United States, 406 F2d 148, 149 (5th Cir., 1969); United States v. Silverman, 430 F2d 106 (2nd Cir., 1970); United States v. Debrow, 346 U.S. 374, 378 (1953) unlike Staszcuk, bear no resemblance to the problem posed herein and are inapposite to the case at bar.

POINT II (answering government's Point II)

THE GOVERNMENT'S POSITION THAT THE SOLICITATION OF FUNDS BY A PUBLIC OFFICIAL FROM ONE WHO COULD BE AFFECTED BY THAT PUBLIC OFFICIAL, CONSTITUTES A VIOLATION OF THE HOBBS ACT, IS UNTENABLE AND INIMICAL TO OUR SYSTEM OF GOVERNMENT AS IT NOW EXISTS.

The government has proffered a novel theory of criminality whereby it would become illegal for any public servant to solicit funds from one who could be adversely effected by that public servant. This would create "per se" liability - leaving the intent of the parties as entirely irrelevant. The term "extortion" would take on an entirely new meaning and would foster a restructuring of our social institutions as we know them today. The government, in what can only be described as hair-splitting, states that this is not its position. Rather it is the government's position that the demand must be made to one who could "adversely and directly be affected" by the manner in which the public official exercised his powers. We fail to note any distinction between the government's present position and the potentiality for mischief as outlined in our original brief to this court. Surfice it to say, any lawyer appearing before any judge could "adversely and directly be affected" by that judge; any citizen could "adversely and directly be affected" by a policeman or a fireman; and any constituent could "adversely and directly be affected" by any action of his elected public official.

The interpretation attempted by the government does indeed create a very mischievious engine of prosecution and undoubtedly would have a far reaching effect upon the entire American political process. Every public official would walk under the shadow of a criminal indictment each and every time he attempted to raise funds for whatever purpose, be it the Boy Scouts, the Heart Fund or the Democratic Party.

The government appears to recognize that its medicine might well be hard to swallow. To make its argument more palatable herein, it argues ad hominem and beyond the face of the indictment (and beyond a Rule 7(c) motion), to the effect that this is not one of the cases of "good" fundraising by a politician, but, rather, that the defendant is a "bad" man collecting for a source (the Republican Party) which the government apparently disapproves of. With all due respect to the government, we must note our dismay at their unwarranted and baseless attack on the integrity of Mr. Trotta. (p. 11, government's memorandum). The fact of the matter is that Mr. Trotta literally worked his way up through the Civil Service Merit System in order to obtain the position he held before he voluntarily resigned in the light of this present indictment. From 1951 to 1957, excluding a period of time in which he served in the Marine Corps in the Korean conflict, Mr. Trotta worked for Nassau County in the Department of Public Works in the insect control division. Then in 1957 he was promoted to labor foreman, and in 1959 he was again promoted to assistant superintendent of parks. In 1964 he became the acting superintendent of parks, and in 1966 he was appointed by the town board as superintendent of parks. In 1971 he was appointed Commissioner of Public Works. Therefore, although Mr. Trotta's job as commissioner was appointive (having been above the civil service hierarchy),

he had proceeded entirely on a Civil Service Merit basis through the Civil Service hierarchy, before his appointment as commissioner.

Although Mr. Trotta lacks a college degree, a qualification upon which the government apparently places undue emphasis, he has always demonstrated, in every position that he has held, exceptional administrative ability. The Town of Oyster Bay has enjoyed a reputation for having one of the finest parks systems in New York State, under the administration of Mr. Trotta. It is most regrettable that we have had to be joined into a debate which lies quite outside of a Rule 7(c) motion.

POINT III (answering government's Point III)

THE INDICTMENT FAILS TO ALLEGE A SUFFICIENT BASIS TO SUSTAIN FEDERAL JURISDICTION.

The government relies on United States v. Aucello, 451 F2d 1107 (2nd Cir., 1971). See our discussion of the Aucello case in our original brief.

CONCLUSION

EACH COUNT OF THE WITHIN INDICTMENT IS FATALLY DEFECTIVE BY FAILING TO APPRISE THE DEFENDANT WITH REASONABLE CERTAINTY OF THE NATURE OF THE ACCUSATIONS AGAINST HIM. MOREOVER, THE GOVERNMENT'S CONSTRUCTION OF THE HOBBS ACT IS UNTENABLE.

Respectfully submitted,

LYON AND ERLBAUM
Attorneys for Defendant
Office & P. O. Address
123-60 83rd Avenue
Kew Gardens, N.Y. 11415

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

A 54

----------x

UNITED STATES OF AMERICA :

-against- :

74 CR 681

GERARD P. TROTTA, :

Defendant. :

----------x

United States Courthouse
Brooklyn, New York

November 27, 1974

B e f o r e :

HONORABLE EDWARD R. NEAHER, U.S.D.J.

IRA RUBINSTEIN
ACTING OFFICIAL COURT REPORTER

Appearances:

A 55

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: EDWARD R. KORMAN, ESQ.
Chief Assistant United States Attorney

MESSRS. LYON & ERLBAUM

BY: HERBERT A. LYON, ESQ.
of Counsel

- - -

THE COURT: Mr. Lyon, I see you have a motion.

MR. LYON: Yes, your Honor. Normally, Mr. Erlbaum has been arguing these motions. Although I expect I am trial counsel in the matter, Mr. Erlbaum is engaged in a trial in Queens, so I have decided to take over the arguments.

What we're moving for now is again a dismissal of the indictment. It seems this is becoming a regular procedure. This is the third indictment which has been submitted and we respectfully submit with exactly the same effects. Specifically, our contention is that the indictment, although it an introduction count, it does not spell out a crime, because in a sense, what the indictment says is that Mr. Trotta had a certain position with the Government and that Mr. Trotta, also a member of the Republican Committee, that Mr. Trotta got a contribution for the Republican Party from Mr. Cosulich and that's all it says.

Now, the contention of, evidently, of the Government is that since they say that he got it under a color of official right that that would be sufficient to spell out a crime. Well, my argument here is not merely a question of technicality of the indictment, but I suspect that this indictment suggests a motivation that is dangerous in the extreme, because

it's what I would call an ex post facto situation of one type.

What the Government is really saying is that even though in our culture we've had politicians and politics and we've had people running for office who are part of different organizations and people have worn several hats in their careers, all through our culture and continue to do it this day, the Government is contending now that if somebody has an official position wherein he might exercise some authority, that in itself is sufficient to suggest that is a threat to the person from whom he gets a contribution for money.

Thus, a Judge who is interested in the Boy Scouts could be subject to such an indictment if he collected money for Boy Scouts or if he collected money for Cancer societies or anything of the sort. Just under the theory that since he has a position of power and the person from whom he's collecting might consider in that position of power, could be used adversely to him.

Now, even assuming that that was so, he doesn't spell out that in effect. That this position was what effectuated the contribution. But I say, if he did, he would not be spelling out a crime. He would not be

spelling out a crime that could possibly be attended by the Congress. He could not be spelling out a crime that could possibly have been intended by our whole cultural system because that's the way we have been functioning up to now.

If this indictment were allowed to stand, then it would seem that all he would -- that you have an agreed statement of the facts. Substantially, all he'd say is that there has been a contribution given not to Mr. Trotta but to the Republican Party. Mr. Trotta was the one that collected it and therefore he's guilty of extortion under the Harp Act.

Consider history of the Harp's Act; that is, certainly not what it was intended to stop.

Now, there is one point I'd like to make. Question: When he talks about the color of official right, I think there has been some tremendous confusion in the use of the language and the understanding of the language of the color of official right. As I understand it, the plain ordinary meaning of language would indicate that when one uses the color of official right, one is deluding the person from whom he takes the money on the theory that because he has this official position, he's entitled to the money. So, that if a man at a toll station would say that instead

of ordinary 50 cents toll, because you have a trailer, there is a ten dollar toll and the person giving the ten dollars really believes that the ten dollars is due, he would be using the color of official rights. He wouldn't be using fear, he would simply be fooling somebody by suggesting that he's entitled to something that he's not entitled to.

In a discussion of the common law concept of the color of official right, this seems to be established and I am referring to criminal law by Roland M. Perkins, put out by Brooklyn, by the Foundation President, 1957 edition. In that book on page 321, the following is stated; the offense of the color under the color of office, the offense consists in the oppressive misuse of the exceptional power with which the law invests the incumbents of an office, hence is not committed unless a fee was collected under the color of office.

Thus, where the solicitor was approached on behalf of a defendant after repeated requests told him he could not advise him as solicitor because he was bound to prosecute, but with $20, advised him as a lawyer, which he did, telling him to post bond and appeal. This was not extortion because it was not collected under the color of office.

Presumably, if he told him I have the right to advise you as a county solicitor, if you give me $20, then he would be operating under the color of office. He would be pretending to have powers he didn't have.

THE COURT: Let me just ask you, I don't mean to interrupt.

MR. LYON: Your Honor, I am pretty well finished. We should focus on something.

THE COURT: Granted that one possible interpretation under color of official right is as you say, a way of dealing with situations in which a man asserts his official position as a basis for collecting money under a delusional --

MR. LYON: To be more than that, it really is.

THE COURT: I grant that that could be a form of fraud.

MR. LYON: Right.

THE COURT: But here we're talking about something which Congress has defined as a possible means of extortion. That is to say, if you look at Section 1951, the term extortion means the obtaining of property from another with his consent. And if you leave out, "induced by lawful use," and simply say, "with his consent, induced under color of official right" --

MR. LYON: Right.

THE COURT: Now, in today's sophisticated world of business dealings of one kind or another, the combination of official position was a power or potential to affect the hopes and the conduct of a businessman dealing with an agency of Government; it would seem to me this could spell out a situation which might be construed as extortive in nature.

MR. LYON: But that would be --

THE COURT: Wasn't that what Congress was attempting to deal with?

MR. LYON: I don't know if Congress was really attempting to deal with it. It was really a racketeering statute.

THE COURT: Well, it is in the chapter on racketeering, but there are cases -- there have been cases under it dealing with --

MR. LYON: It's been extended by the Courts. Let's accept the fact it's extended. If you have a situation such as you say where somebody has an official position and the man knows he has to deal with this person in the official position, therefore he is, he by consent gives the money but implies the reason he is doing it is because he doesn't want to be hurt by the man in the official position.

What you have there is an implied use of fear because what is being done is that the person who has the official position in which he can cut you off out of business, can sell your contracts or not, give you contracts, he's inducing the consent by the use of fear. He's not fooling.

THE COURT: But Congress hasn't limited --

MR. LYON: I know, but the other side of the picture, they didn't heed the other side. Didn't need, "under color of official right," if it's to be used to explain exactly the same situation.

If you -- the situation where a man gives money because he's afraid he's going to be cut off, that's covered by fear.

There could be another situation very readily where a man gives money because for one reason or another he really believes that the person who's asking for it has the right to get it and this is -- that's perfectly proper to do. That would be a wrong-doing, as well.

THE COURT: Maybe that situation obtains here.

MR. LYON: If it does, they have to spell it out. I suggest it doesn't. That's why they don't spell it out, because there is no way they are going to be able to tell Mr. Cosulich that, as commissioner,

he had the right to insist on a contribution to the Republican Party. If they want to say that, if that's the theory, I'd like like to hear it, and we have a right to know what we have to defend.

If the theory was that Mr. Cosulich was fooled, that Mr. Cosulich really thought because Trotta had the commissioner post, he had the right to insist upon the contribution to the Republican Party, then let them say so. Then we'll know what we have to defend.

THE COURT: Let me ask you this question: Regardless of Mr. Cosulich's state of mind, if in fact a refusal to make a contribution did result in some stage with respect to Cosulich's business as a consulting engineer, regardless of Mr. Cosulich's state of mind, would not that be the essential link between the extortion and the effect upon interstate commerce?

MR. LYON: That's right. It's unfortunate, I mention Mr. Cosulich's state of mind. I don't want to use that state of mind at all. What I meant to say is Mr. Trotta attempted to get money from Mr. Cosulich by Mr. Trotta's suggesting he had a right to collect because he was the Commissioner, then that would be under the color of right. They should say so, that Cosulich attempted to get money. Never mind, I'm

sorry, I mean, Mr. Trotta. Never mind Mr. Cosulich's state of mind.

If Mr. Trotta attempted to get money in any way by implying that if you don't give me money we're going to cut out your contract, then, let them say that. We'll know what we have to defend.

The point is, Mr. Trotta could have argued, even could have just indicated to Mr. Cosulich, I have this right, I have this right to get money. I am doing it under the color of right and would be then, if that's what he did, he would have been extending himself and going past his authority and he would have been violating the statute in that regard. If that's what they say, they should spell it out. I have never, never in all my years of experience seen an indictment where the indictment doesn't say something about what you did that constituted the violation of the statute. Even in the statutory rape case in the state, they say what you did. Everybody knows what statutory rape is.

Someplace, somewhere they've got to tell us, got to just say, we violated the statute. If that was so, you won't need an indictment. All they would have to say is some kind of numbering. We are accusing you of violation of Section 1951. This is all he is

saying.

Now, if we violated Section 1951, we'd like to know how. Did we violate it by an implied threat? Did we violate it by suggesting that we had more authority than we really had, then let him say so. But if we leave it this way, then, in the first place, it violates a rule that where -- that an individual should have some clear definition of what the defendan did and, secondly, that it's a very clear maneuver to accomplish something which, I submit, even inter-social revolution, and it seems to me it's fantastic to my mind that this is going on three times and all Mr. Korman would have to do in order to eliminate all this discussion, just add about four or five words, and he doesn't want to do it.

Now, I know Mr. Korman for some time and he's a very intelligent man and a very practical man. It seems to me we could have solved this easily. This has to be a good reason for not solving, that is, the only reason I can see is, by this indictment somehow some big social revolution is going to be accomplished whereby, if you are a member, if you are an official government, you dare not get involved in any type of political official activities. This is what this is accomplishing.

THE COURT: Maybe that is what the Congress had in mind.

MR. LYON: If it was, let's test it.

(Continued on next page.)

THE COURT: This is what the Government is obviously embarked upon.

MR. LYON: No. I don't think so because they want to ve able to put more in. Why didn't we call it agreed state if facts. That's the only way to test that, your Honor.

THE COURT: Let me try to analyze it to you this way: The meaning of the statute is essentially to prevent or curb a fairly common crime known as "extortion."

MR. LYON: Right.

THE COURT: The obtaining of money from another person essentially against his will, that was the original meaning of it. By some form of coercion, of pressure, force, violence, fear, in such a period.

But in today's sophisticated world, we recognize that extortion can take many forms. One of which is for a public official having the power to affect the business of another. Using his position of power of office, of official right to say I expect you to make this payment.

Now, the other man doesn't in fear, let us say, he simply is induced to make that payment because he may want the business. Now, he may not even be the best man to do the business for the municipality.

He may be the worst man, although very often I suppose bidding is done on a low bid basis, but I am led to believe that isn't necessarily a guarantee either. Some discretion may be exercised, and I think that the two elements here that are recommended with a situation are the act of extortion, that is to say, the obtaining of money and the recommendation with a situation showing as of affecting commerce in any way or degree.

Now, I realize the fullness of your argument. You say that element is not really borne out in this indictment. I am simply saying that I am not so sure about that.

If it was the understanding of the person who paid the money that if he didn't pay his, his business, his big dealings could be affected. Whether fear or not, that isn't the point.

MR. LYON: I am suggesting you are stating precisely what I am stating. You have to know, speculate if there were. So then this is adequate.

THE COURT: Yes.

MR. LYON: Well, let him state it.

THE COURT: But now I am getting down to something else. I recognize that --

MR. LYON: We have to get.

THE COURT: In all probability, your greatest experience and familiarity has been in the area of common law crimes of the state. Would that not be correct?

Where these matters are spelled out in the simple form by the direct statements, quantitative statements of acts done whether it be rape, homicide, robbery, et cetera.

MR. LYON: Let me say that was up to about five years ago.

THE COURT: This is not intended to --

MR. LYON: -- to denegrate me, I understand.

THE COURT: In any way.

MR. LYON: I might say in the last five years, I have been so busy representing public officials on conspiracy charges that the inference has changed tremendously. It used to be about 80-20 per cent this way.

I am very familiar, unfortunately, with the process that's going on today.

I have had quite a number of individuals involving conspiracies, involving the crimes that have been well, the anti-racketeering acts and kickbacks and so on. Always we spell out something because, as I tried to point out to your Honor, even in

justifying it, you have to say well, if such and such were the case, then this might be adequate.

Well, that's the point. He should tell us because the rules say so. Let me drop my whole sociological theories for the moment.

Just under the rules as they are today, merely defining a crime, not merely restating the statute. If he says the reason this was a crime was because Mr. Trotta attempted to let this man feel that if you don't deal, you are not going to get the job. Then let him say so; we know what we are defending.

THE COURT: You stated very simply. I understand what you claim to be.

MR. LYON: I claimed the same thing about the second paragraph. So because he also doesn't state how the assets were depleted. He said it affected interstate commerce. Because there was a depletion of assets. Does he benefit from that since the man gave him money? That is supposedly a depreciation of assets that may not be so at all. There may have been a fund for the purpose of contribution.

THE COURT: What I was leading up to, glad to have you mention that point. Those all arent -- those all are matters of fact and proof.

MR. LYON: Except the rules do require that

they give us some indication, not only some indication but a clear indication of what the area of proof is going to be. They are not supposed to have an indictment that leaves them free to start thinking that the time of the bill of particulars, may be a little later as to which way they would like to go. That is all very well in football, if you want to go, be able to go to the right or left end but this isn't a game. They are not supposed to be able to run around the right or left end.

When the indictment is made, if we accept, they might, the grand jury has anything to say about it, has been penetrated for many years. Then the grand jury is supposed to say the crime, not the United States Attorney. The United States Attorney was supposed to present it to the grand jury. The grand jury is supposed to decide on a crime.

Here the grand jury's strict little hand, they leave a crime so open that the United States Attorney now has plenty of time until he makes his bill of particulars, which indicates right or left and to --

THE COURT: Let me state one thing. Then I will ask Mr. Korman to deal with some of your points.

I seem to notice you must have heard, as I have heard, that Congress always had as one of its funda-

mental concerns that no one be in the government, for example, may impose a burden upon interstate commerce and that burden usually is some kind of charge. And many of those cases have gone up as high as the Supreme Court, set aside some action of the state or municipality as a burden on interstate commerce.

Now, here, although you don't think very much of what the Government states was the effect upon the business of Serige, the pleading assets, couldn't that be viewed in and of itself that tax if one can, of a contribution compelled by the circumstances here. As a burden on interstate commerce.

MR. LYON: Well, the only thing with that would be that any larceny, any business would be a burden on the state on just a commerce because that would be a depletion by its very nature.

If you take money, you've taken some money from the business and if you have contributed money, given some money from the business --

THE COURT: We are talking here not about, I quite agree with you, with anyone who is burglarized or held up is depleted of assets. But we don't have to deal with burdens on interstate commerce in attempting to deal with that kind of fraud.

Congress is bound by the Constitution to regulate

???? or limit its regulations, which do restrict interstate commerce. Here the Congress has attempted to by virtue of the fact that Cosulich, according to the indictment, is engaged in interstate commerce.

MR. LYON: I don't think --

THE COURT: I believe that allegation is made at the outset. They "performed services in the State of New York and other states. They are engaged in interstate commerce, purchase and sale of goods and services in interstate commerce," and so forth.

Now, what I am trying to say is, if one may enlighten this extortion of payments, contributions, has in effect a charge upon the services that they rendered which they shouldn't have to pay because it is something superadded.

If you want to do business with the Town of Oyster Bay, you have to contribute. Now, I am saying in that sense it could conceivably be viewed as a burden, a charge upon Cosulich doing business under color of official right because of the allegations here that the man in question, the officer in question, has the right to call the shots as to who gets the jobs, and so forth. Isn't that the more sophisticated form of extortion.

MR. LYON: Yes. That's perfectly true, but

I am going into the question of leaving against -- I am saying he's leaving himself to go around either right or left end.

If we have the right now to say that it's not an interstate commerce, that the assets weren't depleted, he should at least, he says that the reason that it comes into interstate commerce "not merely because they worked in interstate commerce because this depleted the assets." They left and all he can do is tell us how the assets were depleted, so that we have something to argue about.

THE COURT: Well, isn't it very simple? I had less money in the bank after I made the contribution.

MR. LYON: Maybe he didn't really.

THE COURT: You mean in return for the contribution he made a large profit?

MR. LYON: Maybe he makes contributions. Anyway, you know, it seems to me the real evil, they made this on the larger scale at the beginning; simply because I just want to state for the record to your Honor what really concerns me keep it down. But I don't have to do that. I can limit it simply to a pleading argument.

If we take the technicality to just go over

T1R3
IRmm

that, just again very briefly and we keep forgetting that it's really the Grand Jury that spells out the crime. Even though, it doesn't happen that's what the law says.

So, that when it comes out of the Grand Jury that crime should be spelled out.

Now, of course, I know the United States Attorney usually plays it both ways so that he's in a position to see the bill of particulars later and tell you what you really did wrong. By then, if you complain that he's doing something wrong the Grand Jury says, Oh no, the Grand Jury is the one that returned the indictment. I had nothing to do with it.

Now, the theory is that the Grand Jury returns the indictment. Whenthat comes out of the Grand Jury that crime is supposed to be spelled out. The questions of proof are his but the crime is the Grand Jury's. If it comes out of the Grand Jury and that crime is still so indifferent that he has the right to determine precisely what the crime is, even by his bill of particulars, then the hypocrisy of the Grand Jury is so great that we're really violating the law.

Now, here's this indictment and it comes out of the Grand Jury and it says "Depleted theassets" and

we don't know how it depleted the assets. It says, "We took money from Cosulich"and we don't know how we took money from Cosulich. The proof of the matter is, if I were the United States Attorney, I would know now that I can operate out of one of a half a dozen alternatives. In order to convict Mr.Trotta --

MR. KORMAN: Couldyou tell me what they are?

MR. LYON: Certainly. I can say there was fear that was involved. If you want, I'll try your case for you too. I can say that there was fear that was involved. I can say that Mr. Cosulich really believed that Mr. Trotta had this right and this was the policy of the Oyster Bay. This had been done for years and years: that was his official position, collector of money. I can say that.

I can suggest that Mr. Trotta, I can try to prove that Mr. Trotta, said outright that if you don't give me the money, we are not going to give you business. Or suggest that somebody told him that there was a delay because of it.

I have any number of ways in which to try not merely to prove the crime, but any number of ways to construct a theory of the crime.

THE COURT: But the --

MR. LYON: That's left open.

THE COURT: The actual matters that you refer to would be clearly provable under the indictment and it exists.

MR. LYON: That's right, he can.

THE COURT: I don't see -- the very fact of your waiver, those things tend to --

MR. LYON: I'm not supposed to have to be aware of alternatives according to the statute.

THE COURT: I don't consider those alternatives as you put them. I consider them simply, one might say as the bundle of factual proof that substantiates the outline made in the indictment.

MR. LYON: But that's not what the rules say, your Honor.

"The purpose of an indictment is to fully apprise the defendant of the crime in which he is charged so that he may properly prepare his defense in the alternatives."

THE COURT: But this is the way the crime charged is that the defendant, using his official position, committed extortion by extracting money from a contractor doing business with the town.

MR. LYON: No. He doesn't say that.

THE COURT: I think he does.

MR. LYON: Doesn't say by extracting money.

THE COURT: He says, "By knowingly and willfully demanding and obtaining from Cosulich with his concern, but inducement by the fact he was acting under color of official right."

That is to say, Cosulich was a lawyer, he was Commissioner of Public Works, he had a deal with him.

MR. LYON: Would he be restricted to that, then?

THE COURT: I don't know.

MR. LYON: I would like to to on the agreed state of facts if that's the purpose to establish that this could be a crime. I would like to go on agreed state of facts on that on that.

THE COURT: Would you agree that if he didn't get the contribution he --

MR. LYON: Now, that's what I want to --

THE COURT: The proof here would require interference and I would assume it would have to be some proof of interference.

MR. LYON: Now, you may assume that --

THE COURT: Well --

MR. LYON: And I say, may assume that but I have no idea whether that's what he is going to try to prove;

THE COURT: Mr. Korman.

MR. KORMAN: Just interested in his proposal in respect to the facts.

THE COURT: Is that what caused you to arise?

MR. KORMAN: Yes.

T4 MR. LYON: I would love to have an agreed statement of fact. There was a contribution made that Mr. Trotta collected the checks and Mr. Trotta had no position and let's go on that, period.

MR. KORMAN: Well --

THE COURT: I don't think that would quite fulfill the requirement.

MR. LYON: That's precisely my point.

THE COURT: But I don't think --

MR. LYON: I think Mr. Korman, that's why the indictment is written this way.

THE COURT: I'll tell you, I have a note from the Jury. May I ask you to just sit in the front row benches.

(A short recess was taken.)

THE COURT: Mr. Korman, wait a minute for a response to Mr. Lyon's comments about the sufficiency of your indictment.

MR. KORMAN: Before I begin, your Honor, I just wanted to note that the defendant has not yet pleaded to this indictment. I agree with Mr. Erlbaum, we do

delay the pleading until a convenient time and there was no objection to that.

I just wanted to call that fact to your Honor's attention

THE COURT: All right.

MR. KORMAN: Your Honor, we believe this indictment is plainly sufficient in that the word "under color of official right" to which Mr. Lyon objects, is the legal terms subject to proof at trial.

That there are hardly three or four alternatives and as a matter of fact, the only alternative I could see from far-fetched theory that possibly Mr. Trotta believed Mr.Cosulich believed there was a authorized public work to collect contributions for the Republican Party. Other than that, I don't know how many alternative theories we have. We defined the term a memorandum of law that we filed in response to the motion to dismiss the other indictment. This indictment charges that Mr. Trotta demanded monies for the benefit of the Republican Party from Mr. Cosulich.

It alleges that Mr. Trotta held a position, public position, through which he could adversely affect the business of Mr. Cosulich's business firm. That Mr. Cosulich's firm did business with the town of Oyster Bay and as a result of those two facts, Mr.

Cosulich believed and was Mr.Trotta had and was reasonably understood by Mr. Cosulich and its members to have the power to take action, which could adversely affect will see associates. Having defined the position of those two parts, the indictment goes on to allege that thesums of money alleged in each of those two counts obtained and demanded from William Cosulich Associates for the benefit of the Committee of Republican Committee of the town of Oyster Bay and /consent to the payments having been induced, under color of official right; that is, by virtue of the fact that Mr. Trotta held the position which he is described as having held that the introductory portion of the indictment.

If Mr. Lyon wants to have a clearer more detailed statement that would be the function of a bill of particulars. I would suggest that if what Mr. Lyon says is so about an indictment, have to allege that we would need bills of particulars because I don't know what more we could say.

If in fact, the indictment containd all of a minute allegations which he would have it contain. With regard to the allegations about the effect on Interstate commerce, the indictment against him alleges that the aforesaid conduct; that is, the obtainirg of monies under color of official rights,

with regard to the allegations about the effect on interstate commerce, the indictment against him alleges that the aforesaid conduct; that is, the obtaining of monies under color of official right, depleted the assets of William Cosulich Associates because in effect, William Cosulich's business is interstate commerce. Then, as a matter of law, commerce was affected.

We have a number of cases to support that and I will call [illegible] to the attention of Mr. Erlbaum; when, he has discussed United States against Orgello. I have a copy as a matter of fact, I got from the Federal records a copy of Judge Zavat's charge, which was expressly approved by the Second Circuit in United States Orgello and Judge Zavat charged the Jury:

"Well you have heard of the interstate commerce clause of the Constitution. United States I am sure and I charge you that the United States has jurisdiction over all interstate commerce shipments and deliveries of any goods from any kind from one point to another point."

Now you heard the witness that Mr. Rosen at the time stated in the indictment "owned and operated an eating place in Brooklyn and that he purchased several of his food supplies from a company in New

New Jersey to the extent as I recall $15,000 a year." This is what Judge Zavat told the Jury. It was approved by the Board of Appeals.

"Now, if you find beyond a reasonable doubt that supplies were brought into Rosen's place of business from Brooklyn from the State of New Jersey or any place outside of the State of NEW York, as been testified to by Mr. Rosen, I do not recall the many officers of that. There are many people who sell those that are those products are used in this place of business I believe he testified to that, deliveries are made daily.

"Now, if you find beyond a reasonable doubt that Rosen brought his materials, then I charge as a matter of law that whatever activities you should find beyond a reasonable doubt were committed by defendants, then I charge as a matter of law that you find that if you find beyond a reasonable doubt that there was extortion this now certainly is an element. It is not for you to pass on."

So, that the question of -- and I am reading from page 1887, 1888 and 1889 of the transcript. The elements of course, is a question of law for your Honor to decide. If you believe and we believe that the indictment was plainly sufficient in alleging and

satisfying the requirement of the statute.

THE COURT: In other words, is it fair to say that it is your position that where a businessman or business is in fact engaged in interstate commerce that inducing him to part with money either by force or violence, which I think was the case in Orgello, isn't that right.

MR. KORMAN: Right.

THE COURT: Or under color of official right, as a public official that in and of itself is sufficient under the statute to constitute a crime.

MR. KORMAN: That's correct.

THE COURT: If proved in fact.

MR.KORMAN: IF the money came from the business.

THE COURT: Yes.

MR. KORMAN: Yes.

THE COURT: That's the essence.

(Continued on next page.)

T5

MR. LYON: I understand that's his argument. That the mere, if you proved the crime and if the outfit was an interstate commerce, then he's really saying that's all you need. You don't have to show depression of the assets because if money was part of the crime, then that's all he would need.

THE COURT: I think if I'm not mistaken, there was some reference to a charge upon the man's business dealings.

MR. LYON: That's right.

MR.KORMAN: Taking of the money from the business essentially dissolves a depression of assets.

THE COURT: Now, I guess that's its simplicitor

MR. KORMAN: Of course, he took it and in the Hope Burgess case he may have taken it from the bank.

THE COURT: It doesn't convert you, Mr. Lyon, I am not suggesting at all --

MR. LYON: I'd like to point out the difference. It was very clear inthat case that he took it from the source that was not specified for in this purpose. It's not unusual for businesses to have monies that are for the purpose of contributions. This is really the difficulty that we're in now.

THE COURT: Well that may be which -- be

actively set aside as a fund to be used on occasion such as this. But to my way of thinking, whether the act is innocence act or a guilty act, is precisely the function of the Jury to determine on all the facts.

MR.LYON: Whether the act of taking the money is innocent or guilty, the act --

THE COURT: Wouldn't you agree with that?

MR. LYON: That's true. I say for the sufficiency of the indictment, your Honor should now know before we even have the trial what they are claiming.

Are they claiming that this money came out of funds that would be used for the conduct of the business.

THE COURT: Well, I would say without trying to tell the Government what its case really is, it seems clear to me the Government's position as expressed in this indictment is; that this man Cosulich's business is in a manner which would bring him within the interstate impact theory, if you want to call it that. Such as the hamburger stand in Brooklyn buying its provisions from New Jersey. I assume there will be proof that Cosulich dealt in other states as well as New York.

MR. KORMAN: There will, your Honor.

THE COURT: And that that his business derived its revenues in effect from dealings in other states than New York and the arguments will be; that there was, no other reason on earth to extract, if you want to call it that because there is a demand, a demand the contribution claim. And the fact he was dealing that part of his business dealings were with the town of Oyster Bay, and that the official who extracted contribution did so by virture of his position.

MR. LYON: You see, that's only because Mr. Korman says so. They don't say so, a demand.

THE COURT: I think that comes rather clearly.

MR. LYON: I could demand money from somebody, a public-spirited citizen. I could say to someone look, you are, should contribute to the party in which you are interested otherwise, the party can't exist. That's a demand.

I could say that to somebody, you should contribute to the Boys Scout because you're a public-spirited citizen and we don't have boy scouts. We're going to have a lot of child delinquents.

The question is, well was this the only way we know what the indictment is talking about and the indictment is returned by the Grand Jury not by Mr. Korman.

The only way we know what it's talking about when Mr. Korman explains it or when he's going to explain it, when his memorandum -- he says if you refer to my memorandum it tells you clearly what I mean by color of right. Well, I'm not supposed to have to refer to his memorandum to understand the indictment. See, he misstated a little bit what he said, "He doesn't have to give me the minutia that Mr. Lyon asked for." I'm not asked for minutia. I'm not going for exact words. Anybody said I am not asking for details? I'm just asking for the theory. I'm asking for something more than the statute.

THE COURT: Are you asking that when we come down to the charging counts that it should read;

"That the defendant Gerard P. Trotta, acting as Commisioner of Public Works of the Town of Oyser Bay, did unlawfully and so forth by knowingly and willfully anddemanding that in that capacity the sum of $2,000"?

Is that what you are saying?

MR. LYON: By demanding as a public commissioner.

THE COURT: That's what I am saying. That the defendant Trotta, the Commissioner of Public Works did unlawfully attempt to effect commerce? And the man in that capacity and --

MR. LYON: Certainly entitled to at least and that he didn't demand it, just as public-spirited citizens or Republican party to which Cosulich may havebeen, looked to which he could have done. He could very well have done. It happens all the time and I'd like, I think that would spell out the crime. If Cosulich came to Republican meetings and Trotta was also a Republican and Trotta said look our party is in trouble, you have got to come up with it.

THE COURT: Let me ask you this. If that's what we're really focusingon, isn't that a matter of defense?

MR. LYON: No. I don't think so because he's got to spell out a crime. He's the one that's got to spell out a crime. I don't offer that proof of innocence.

THE COURT: No, you don't have to prove innocence.

MR. LYON: He's got to show what the crime is. If he says, if he says that I ask Mr. Winder, who is employed by me that I insisted that Mr. Winder do one th i ng or another, say gives some money to Mrs. So-and-so that doesn't spell out a crime.

Now, it might have been a crime. It might be that Mrs. So-and-so is my mother-in-law and I'm looking

for him to do that because I have certain powers to influence his advancement. But it might be that's his mother-in-law and I think as a good son-in-law he ought to buy that one with the money because she needs it. Now, he doesn't say and where isthe crime? Where is it a crime if somebody says to somebody else, you got to contribute money to a political party, unless that party is using something, using his position. But he doesn't say that either

THE COURT: Well, I --

MR. LYON: He doesn't say what he demanded.

THE COURT: It certainly seems farily implied here that is the --

MR. LYON: There could be an implication if one wants to look for it. But I say that -- you see, the thing is that we come back to the fact the Grand Jury returned the indictment, Mr.Korman didn't.

Now, we can't go as the system, is that what you mean?

We have a right to know what that, when they return the indictment they knew what they were talking about. They are not just indicting him for asking as one Republican to another; "please help us out in the party. It's now the time for all good men to come tothe aid of their party."

If that's what they did, then they didn't spell out a crime and we shouldn't have to go to the expense of defending it.

THE COURT: Are you telling me here you agree with my view if it had said, "Acting in his capacity" that that --

MR. LYON: I would say so.

THE COURT: That would do it?

TG fls

(Continued on next page.)

MR. LYON: I would say that's a bare minimum. I think that, you know, that they could be a little less stingy and give us a little more.

MR. KORMAN: Bill of particulars?

MR. LYON: But I shouldn't have to ask for a bill of particulars.

MR. KORMAN: Tell you what. Ask me for a bill of particulars and I'll ask the Grand Jury to vote on it.

MR. LYON: That's precisely the point. We shouldn't have to defend this. Shouldn't have to be put through the trouble, the expense, and the worry of defending a charge, when we don't really know whether the charge constitutes a crime.

MR. KORMAN: First of all, I would say that, if Mr. Trotta in his capacity, then the commissioner as defined in his capacity, as defined in this indictment went to Mr. Cosulich individually as defined, in his capacity and said, it's now the time for all good men to come to the aid of the Republican Party. There is a possibility of a prima facie case. What the offense is, public official going to someone who is subject to the, can be affected by the adverse exercise of the power of his office and demanded something from him then he is not entitled to under color of office.

If a judge called up someone and said, you should contribute money to the Boy Scouts, that would be a violation of the canon of ethics. Precisely, because it's understood that kind of conduct, where a judge calls up a lawyer inherently has implied threat, is improper. That is the same type of conduct the statute is aimed at.

MR. LYON: I am very glad he said that because now, we're really down to the hub of this. Now, did the Grand Jury understand that? Is that what they're charging him with? When I was called by a judge and asked to contribute to Brooklyn Law School to the Brooklyn school alumni, pressured to give those dollars to the Brooklyn Law School so we could build a Brooklyn Law School, was he committing a crime?

THE COURT: Well, of course, you have to be aware we're talking interstate commerce.

MR. LYON: All right. But suppose it were interstate commerce so I can show my practice interstate commerce.

THE COURT: No. Court of Appeals has ruled you're not.

MR. LYON: I know, well --

THE COURT: I mean, the New York Court of Appeals.

MR. LYON: I understand.

THE COURT: But what I'm getting at is this; Mr. Korman just stated his position. Did the Grand Jury understand and he says that when somebody asks us --

MR. KORMAN: That somebody.

MR. LYON: Wait a minute, let me finish. Somebody who has --

I know what you said, I'll state it correctly.

MR. LYON: Somebody asks you for a contribution in one field, in which you both belong but that somebody also wears an official hat, he says that is ipso facto a crime.

Now, the Grand Jury returned such an idictment. That's precisely what I'm saying. Did they realize that that is what they were returning and that's what I'm asking your Honor to rule on. He is really going on that and that alone and that I say is not a crime under our law. That you have to show more than that. That if, a man wears two hats, you have to show that he was using one of those hats to influence the other hat.

At this point in time, in our society, it would be disasterous to suddenly change the rules so that anybody who is in the position where say, he's occupied with the Boy Scouts and also has a public office, could

be considered to have committed a crime simply because he said to somebody as a public spirited citizen, you should contribute to the Boy Scouts.

Now, this is what I say the indictment is really charging us --

THE COURT: You say there is an inherent ambiguity.

MR. LYON: Absolutely. That's all, when I look at it I need another explanation. To make sure that's what he's charging us with. If that is true, then I say the indictment does not abide by the rules because not saying what he is really, wants to prove and I'm not talking about Minucci (phonetic) at all. I'm talking about the thrust of the crime. Because I'm under this, I really don't know.

Now, of course, I can speak to Mr. Korman in the hall and find out otherwise, but I'm not supposed to have to do that. Under this, I don't know whether it says, look your man Trotta had a public position also an official of the Republican Party. Cosulich used to contribute to the Republican Party all the time. When Trotta said, hi, you didn't make your contribution last year, like "last year" that's a crime period.

I don't know, is that what I'm going to have

to defend against? I certainly can't tell from this.

MR. KORMAN: Can't tell?

MR. LYON: And he should and the Grand Jury couldn't tell either, that is not enough. That should be sent back to the Grand Jury so that they can know that they are spelling this out as a crime. If that's what it is, then let them make that clearer. Let them say, in that Mr. Trotta as an official of the town of Oyster Bay had no right to ask for a contribution for the Republican Party. Then, we'll know that's what we're fighting.

MR. KORMAN: That's what they say.

MR. LYON: No, that's not what they said.

MR. KORMAN: That's the crime that's alleged.

MR. LYON: Then, if that's what they say, I suggest to your Honor that is not a crime under our statute that should be thrown out for insufficiency. If that's what Mr. Korman, and I think,generally, when you come down to the real hub of it, if Mr. Korman is saying that is what the Grand Jury said; that Mr. Trotta, as an official of Oyster Bay also being an official of the Republican Party,asked for a contribution --

MR. KORMAN: They didn't say, "Also" what his position was in the Republican Party is not --

MR. LYON: That's very nice, but they should have then said, if they're saying that Mr. Trotta, as an official of Oyster Bay, obviously not going to ask for a contribution to the Republican Party if he's a Democratic Liberal Socialist. So, from the obvious, he had to be in the Republican Party.

MR. KORMAN: Even though it's not alleged, it's obvious.

MR. LYON: That's right. This is obvious or should have been alleged. The point is, it should have been alleged he was a member of the Republican Party, but if they're saying as an official of Oyster Bay, simply asked for a donation to the Republican Party of a Mr. Cosulich and that in of itself is a thrust of their indictment, I say they have not spelled out a crime under the statute.

MR. KORMAN: Your Honor, he's ignoring all of the allegations in the introductory --

MR. LYON: No, I am just answering your Honor's argument now. One point --

MR. KORMAN: The Grand Jury spelled out quite clearly that they viewed each of these defendants and in reading the charge in counts,

One, you have to read into it the description that's contained.

That the Grand Jury description of their concept of the statute of each of the defendants and they say, "That the defendants Gerard P. Trotta had and was reasonably understood by William F. Cosulich Associates, and its members, to have the power to take action which could adversely affect William F. Cosulich Associates in obtaining and performing contracts with the Town of Oyster Bay, Long Island.

THE COURT: In other words, having that power. Is that what you're saying?

MR. LYON: Might just as well say, he was a member of the Rifle Association and he had a rifle. They don't say he used that power or employedly used that power or did something to suggest that he was using that power.

They might just as well said, he keeps rifles in the house and he could have used that rifle. Or, that he was bigger than the other fellow. That's the silliest thing I ever heard. Anybody has some kind of power someplace.

If I don't have the power as a man, who is an official of Oyster Bay, I have the power that I may be stronger than somebody else for I may be a bigger man and in any act, I always have the power to force somebody if I want to. The question is, is there anything

in my actions from which you can at least imply there was a suggestion I was going to use the power? Certainly not a crime to have power, good Lord.

THE COURT: Well, the government is going to have to prove --

MR. LYON: I know it's going to have to prove.

THE COURT: He did this under color of official right. That's what is alleged there.

MR. LYON: But what does it mean, "under color of official right"?

MR. KORMAN: The definition of law.

THE COURT: The color of his official position.

MR. LYON: But they don't say that.

MR. KORMAN: We do. We talked about it.

THE COURT: I don't see what else it could mean. I don't see what else the term could mean under " term of color of official right". It means, I am the comm sioner and nothing else. I am not talking to you as a Republican Party official, I am talking to you as a commissioner, as the commissioner of Oyster Bay and I have power over you.

MR. KORMAN: Paragraph two.

MR. LYON: Yes, Paragraph one.

MR. KORMAN: Two.

MR. LYON: Of the introduction?

THE COURT: Here, if you look down --

MR. LYON: You're talking about Count One.

MR. KORMAN: Paragraph two and three of the introduction.

THE COURT: Yes.

MR. LYON: Well, may I just read it aloud, then, "The defendant Gerard P. Trotta, at all times relevant herein, was Commissioner of Public Works of the Town of Oyster Bay, Long Island. As such, the defendant Gerard P. Trotta, was "authorized and empowered, subject to the prior approval of the Town Board . . . to retain and employ private engineers, architects and consultants, or firms practicing such profession, for the purposes of (1) preparing designs, plans and estimates of structures or projects of any type and character; (2) rendering assistance and advice in connection with any project, whether defined or proposed and under the supervision of the department of public works; and (3) performing such other and necessary services as the commissioner may deem necessary in the administration of the department. (Town of Oyster Bay, Local Law #2-1966). Moreover, at all times relevant herein, contracts which were entered into by the Commissioner of Public Works of the Town of Oyster Bay on the Town's behalf, including

contracts with William F. Cosulich Associates, generally designated the Commissioner of Public Works as the representative of the Town of Oyster Bay, who was vested with complete authority to monitor and oversee the performance of the contractor.

"Accordingly, the defendant, Gerard P. Trotta, had and was reasonably understood by William F. Cosulich Associates, and its members, to have the power to take action which could adversely affect William F. Cosulich Associates in obtaining and performing contracts with the Town of Oyster Bay, Long Island."

"Accordingly, the defendant Gerard P. Trotta, had a reason, understood by William F. Cosulich Associates and its members. to have the power to make any action. It doesn't say --

MR. KORMAN: Which could adversely --

MR. LYON: All it says is that they understood he had a certain power.

THE COURT: Now, if you go down to the charging counts where it says, "He knowingly and willfully demanded and obtained any money" even though he obtained it with the consent of Cosulich, Cosulich was induced to bribe the defendant Trotta under color of official right.

MR. LYON: It doesn't say that Trotta used it.

THE COURT: It doesn't say anything about the Republican Party.

MR. LYON: Doesn't say Trotta used it. Suppose you said under this proof that this was simply in Cosulich's mind and it was a further thing from Trotta's mind. Don't have to say --

THE COURT: Isn't that a matter of the evidence.

MR. LYON: I don't think so. I think that's a matter of crime. If I don't have it in my mind, they at least have to claim that I had some interest to do this. That's what you "knowingly and willfully" mean.

THE COURT: Generally speaking, if the court is satisfied that the indictment is sufficient under the rules --

MR. LYON: That's the proof.

THE COURT: The real test of the indictment comes when the evidence is in. The court has the power to direct judgement of acquittal if it is satisfied on the showing of the evidence no crime was made out.

MR. LYON: Yes. But don't you think the rules say the indictment must make out a crime and specify the crime.

THE COURT: It's up to the court to decide whether it's sufficiently specified. I may be in error in so deciding in this case, if I do so decide.

MR. LYON: Right.

THE COURT: But the point of it is, if we're going to test whether the facts and circumstances within the context should have really constituted a crime, the Appellate Court will take the view those facts and circumstances are to be tried out. That what the courts on the appellate level would want, is the context of the acts not on the question of whether or not acts make out a crime.

MR. LYON: I appreciate that, but let's say this; at this point now, and I think your Honor has the power whether it constitutes a crime or not. The crime clearly is not what's in Cosulich.

THE COURT: Let me say,I have the first guess.

MR. LYON: The crime cannot be what's in Cosulich's mind. Let's go into Trotta's mind.

THE COURT: I don't read that as necessarily meaning just Cosulich's state of mind having been induced by the defendant Trotta under color of official right.

MR. LYON: That's what it says.

THE COURT: That could be read as an affirmative statement by Trotta that prompted the contribution. You understand?

MR. LYON: Anything could be, but it's just not

what it says.

THE COURT: It depends on the evidence in the case. The government will have to prove it was induced by him.

MR. LYON: Judge, then I am laboring under some misapprehension. I thought on this motion I can go to the face of the indictment.

THE COURT: No.

MR. LYON: Without talking about the evidence and saying that the indictment is insufficient on its face.

THE COURT: I am not controverting that. It does get down to whether the words used in the view of the court comply with the statutory rule regarding --

MR. LYON: And I say, it doesn't.

THE COURT: I know you don't and I know the reasons why. I have heard, I believe, Mr. Korman's reason but I would like to know, are you planning, Mr. Korman, to submit a reply brief on this.

MR. KORMAN: I would, if your Honor would like it. I know I would.

THE COURT: I know you submitted the brief the first time.

MR. KORMAN: We just received this brief on November 23, only four days ago.

THE COURT: I realize you just received it and I'll give you an opportunity to reply. How much time do you think you should have? A week, two weeks.

MR. KORMAN: Well, two weeks.

MR. LYON: Just one last thing I would like to say. There was a case that was discussed in the minutes last time. I don't know --

United States of America against Staszcuk. In that one, the whole question was carefully spelled out. The indictment specifically stated precisely what the crime was. Certainly not in this --

THE COURT: We discussed that the last time and I was of the belief that that would have represented an indictment, which would have spelled out on the face what the acts were.

But I'm not necessarily saying this does not.

MR. KORMAN: Of course, that validity of the indictment in that case wasn't at issue. Your Honor, as a matter of fact, I don't think it would have satisifed you on the interstate commerce aspect.

THE COURT: Well, I'm not so sure of that.

MR. KORMAN: Your Honor, we would move to dismiss the indictment that was superseded.

THE COURT: 74CR552? I'll grant that motion. I don't think I heard from you yet as to what I might

expect to receive.

MR. KORMAN: Could I say, your Honor, two and a half weeks.

THE COURT: Two and a half weeks.

MR. KORMAN: I've just got ten, fourteen days.

THE COURT: Around the fourteenth of December.

MR. KORMAN: Friday.

THE COURT: Right.

MR. LYON: Will we have a copy at that time.

MR. KORMAN: Of course. Also, your Honor, there is a question about we filed an affidavit on place of trial several weeks ago.

THE COURT: I haven't considered those. Believing, of course, that's a decision I could make at any time. I don't know what Mr. Lyon's position might be with respect to that.

MR. LYON: So far, we have been asking for --

THE COURT: Have you seen Mr. Korman's affidavit?

MR. LYON: I have seen it, yes. But I would prefer, if your Honor's decision in this matter.

THE COURT: I might point out that based on my present calendar, criminal trial, there is little prospect of this case being reached for trial before April at the earliest period. Now, that situation could change if one of the vacancies failed here and

some of the additional criminal cases, very much older vintage we had to take because of Judge Travia's resignation. All of us have received many of those. Very much older cases and we're trying to give them priority. According to scheduling by its number, it's much later in point of time.

I simply point that out. In terms of any, if this indictment is sustained in terms of any request for particulars and other discovery and all that. It should be done because I would expect that we be certainly ready to try to get this case set down for April or May.

MR. KORMAN: I will say, your Honor,

THE CLERK: The fourteenth of December is a Saturday.

THE CLERK: On Friday the thirteenth.

MR. KORMAN: Then the bill of particulars, I'd be prepared to answer them if they would be of any help to your Honor.

THE COURT: I'll reserve decision.

MR. KORMAN: One more thing.

MR. LYON: We're not coming back on this.

THE COURT: No.

MR. KORMAN: The fact the defendant pleaded making it important for me to state our readiness

for trial.

THE COURT: No adverse consequences. You confirm that?

MR. LYON: Whatever agreement Mr. Earlbaum (phonetic) made, I will stand.

MR. KORMAN: Mr. Trotta's plea, because we delayed at no end,but we are ready for trial.

THE COURT: All right.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - -x

UNITED STATES OF AMERICA :

-against- :

GERARD P. TROTTA, :

Defendant. :

- - - - - - - - - - - - - - - - - -x

74 CR 681

MEMORANDUM AND ORDER

APPEARANCES:

DAVID G. TRAGER, ESQ.
United States Attorney,
Eastern District of New York
By EDWARD R. KORMAN, ESQ.
Chief Assistant U.S. Attorney

LYON & ERLBAUM, ESQS.
Attorneys for Defendant
By WILLIAM M. ERLBAUM, ESQ.

NEAHER, District Judge.

Defendant, a former public official, was indicted while in office for allegedly attempting to affect and affecting commerce by the extortion of political contributions from a partnership of consulting engineers in violation of the Hobbs Anti-Racketeering Act, 18 U.S.C. §1951.[1] He has moved to dismiss the indictment, contending (1) it lacks "a plain, concise and definite" statement of specific facts

essential to the offense as required by Rule 7(c), F.R.Crim.P.; (2) it is too vague to protect his constitutional rights to be informed of the nature and cause of the accusation against him; and (3) it is insufficient as a matter of law for failure to allege how, why or in what manner the alleged extortion had an effect on interstate commerce. The merit of those objections must be tested only against the face of the indictment. Extrinsic particulars cannot be relied on to supply any missing essential element. Russell v. United States, 369 U.S. 749, 769-770 (1962).

Briefly, the indictment describes defendant's official position and authority as the Commissioner of Public Works, Town of Oyster Bay, Long Island. The alleged extortion victim, William F. Cosulich Associates (hereinafter "Cosulich"), is identified as a firm of consulting engineers that provided such services to the Town of Oyster Bay and engaged in interstate commerce. The defendant's powers of office, to the extent they could affect the retention and employment of Cosulich for the Town, are spelled out in some detail, concluding with the allegation that, as was reasonably understood by Cosulich, defendant had

"the power to take action which could adversely

affect William F. Cosulich Associates in obtaining and performing contracts with the Town of Oyster Bay, Long Island."

With that, each of the two counts in the indictment alleges in haec verba that defendant violated the Hobbs Act "by knowingly and wilfully demanding and obtaining from William F. Cosulich Associates" a specified sum of money on or about a specific date (different in each count),

> "for the benefit of the Republican Committee of the Town of Oyster Bay, Long Island, with the consent of William F. Cosulich Associates, and its members, to the aforesaid payment having been induced by the defendant GERARD P. TROTTA under color of official right." (Emphasis supplied.)

Before discussing defendant's criticism of those allegations, some comment on the precise nature of the alleged offense is in order. Defendant is charged with affecting commerce by means of "extortion" in violation of 18 U.S.C. §1951(a), as that term is defined in §1951(b)(2), supra n. 1. Comparison of that definition with the above emphasized language of the indictment reveals that this case is founded solely on the statutory definition of extortion as "the obtaining of property from another, with his consent, induced . . . under color of official right." Id.

Recent case law leaves no doubt that the language "under color of official right" is regarded as broad enough to include within its scope any public official or employee who wrongfully uses his official position to exact a payment not due him or his office, under circumstances which can be said to affect commerce "in any way or degree", supra n. 1. United States v. Braasch, 505 F.2d 139, 151 (7 Cir. 1974) (police officers exacting "protection" money from liquor establishments); United States v. Crowley, 504 F.2d 992, 995 (7 Cir. 1974) (police officer demanding periodic payoffs for "providing security" to bowling alley); United States v. Staszcuk, 502 F.2d 875, 877-78 (7 Cir. 1974) (city alderman accepting payment not to oppose a zoning application); United States v. Kenny, 462 F.2d 1205, 1229 (3 Cir.), cert. denied, 409 U.S. 914 (1972) (city and county officials exacting "kickbacks" as a condition to award of public contracts); United States v. Irali, 503 F.2d 1295, 1299-1301 (7 Cir. 1974) (clerk in city collector's office expediting liquor license application for suggested payment); United States v. Price, 507 F.2d 1349, 1350 (4 Cir. 1974) (county council chairman requiring payment to insure grant of motel permit).

The offense of extortion "under color of official right" is separate and distinct from coercive extortion — whereby property is obtained "by wrongful use of actual or threatened force, violence, or fear"[2] — in that proof of such duress is generally thought not to be required.[3] Instead, the "office held by the official provides the coercive impetus which generates the payment."[4] More generally, it has been held that this portion of the Hobbs Act states an offense equivalent to the common law crime of extortion, a crime that originally only a public official could commit.[5]

Against this background can it be said that the statutory language used in this indictment renders it insufficient and constitutionally vague, and fails to give defendant adequate notice of the charges against him? The defendant argues in essence that no facts appear on the face of the indictment which identify any conduct on his part pointing to criminality. Thus, he contends, he is left uninformed of the specific acts or conduct alleged to be in transgression of federal law.

The standard for judging the sufficiency of an indictment employing the words of a statute was recently

reiterated by the Supreme Court in Hamling v. United States, ___ U.S. ___, 94 S.Ct. 2887 (1974), at 2907:

> "It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.' United States v. Carll, 105 U.S. 611, 612, 26 L.Ed. 1135 (1881)." (Emphasis supplied.)

The government rejects the claims of insufficiency, vagueness and inadequacy of notice, asserting that all of the "crucial facts" are alleged. These are identified as (1) the defendant's official position; (2) his ability to take official action adversely affecting the victim; (3) the victim's awareness of that power; and (4) the defendant's demand for, and receipt of, monies from the victim on the dates alleged.[6] In the government's view these are the essential elements of the offense charged, aside from the commerce element. As its brief states, "our position was that a demand for monies made by someone holding a public office from another person who could 'adversely and directly be affected' by the manner in which the public official exercised his powers constituted extortion under color of official right."[7]

Close analysis of the Hobbs Act and the cases applying it to local public officials casts serious doubt on the government's conception of what constitutes a violation of that Act. There is no question that Congress viewed actual or attempted interference with commerce by extortion or other unlawful means as a major federal offense. This is manifest from the severity of the penalty authorized for offenders — up to twenty years in prison and/or a $10,000 fine. In sharp contrast is the penalty for extortion committed by federal officers or employees "under color or pretense of office" as reflected in 18 U.S.C. §872. For that offense — which could be committed by officials of vastly more powerful position than that held by this defendant — the maximum punishment is three years in prison and/or a $5000 fine. The same maximum punishment is provided for federal officials who solicit or receive a "contribution for any political purpose." 18 U.S.C. §602.

Plainly, as the reported cases show, to allege a Hobbs Act violation requires substantially more than the "crucial facts" offered by the government. The charging portions of the instant indictment do not allege even the official extortion forbidden to federal officials in 18 U.S.C.

§872. Defendant is not accused of having made demands upon Cosulich "under color or pretense of office"; only that Cosulich's consent . . . [was] induced by the defendant . . . under color offofficial right", p. 3 supra. And the government has clearly stated its interpretation of the last quoted clause: that defendant's "ability to take official action adversely" to Cosulich and the latter's "awareness of that power" constitutes extortion "under color of official right", p. 6 supra (emphasis supplied).

Although the victim's state of mind is always an essential element of the crime of extortion, United States v. Kennedy, 291 F.2d 457, 458 (2 Cir. 1961), it is not a substitute for the key essential element — actions or words by the alleged extortioner which induce a reasonable compulsion in the victim to submit to the extortioner's demand. While, as already noted, p. 5 supra, official position is regarded as a coercive substitute for threats of harm, that is not to say that a local public official who demands and obtains a political contribution from a businessman he can adversely affect ipso facto violates the Hobbs Act. Such a practice, however questionable and not to be condoned, is not extortion within the meaning of that Act any more than it is under the

Penal Law of New York.[8]

An allegation that the defendant is a public official is not enough. Power inheres in public office. Every public official possesses the ability to affect favorably or adversely those who must (or believe they must) deal with him. The mere possession of that ability or the alleged victim's state of mind regarding it does not supply the missing element; nor does the defendant's "demanding and obtaining" the alleged political contributions. Solicitations for a political party are not part of any official duty. Whatever one may think of the ethics of the practice, a local public official's solicitation or receipt of political contributions is neither unlawful nor extortionate unless a corrupt use of the public office is manifest. See United States v. Sutter, 160 F.2d 754 (7 Cir. 1947). See also N.Y. Penal Law §200, et seq. (McKinney 1975).

Since the days of Blackstone, extortion under color of office has been uniformly recognized as the unlawful or wrongful taking by a public official of money not due either to the ofice or the official.[9] It is of the essence of the offense that "[t]he money . . . received must have been

claimed or accepted in right of office, and the person paying must have yielded to official authority." 3 Wharton, supra n. 5, §1393. See R. Perkins, Criminal Law 369-70 (2d ed. 1969). In addition, the officer must act with a corrupt motive, as the synonomous terms "under color of office" and "under color of official right" are technical expressions implying bad faith, corruption or breach of duty. See 3 Wharton, supra n. 5, §1394; Perkins, supra at 371; Stern, supra n. 3, 3 Seton Hall L. Rev. at 14-15 & n. 61. See also the recent cases noted above, p. 4 supra.

The instant indictment contains on its face no allegation of acts or words by defendant which could reasonably be construed to satisfy the elements of "extortion . . . under color of official right" within the meaning of the Hobbs Act. The words "wrongful use of" in the statutory definition, §1951(b)(2), must be read in conjunction with "under color of official right" as they are in the case of "actual or threatenod force, violence, or fear"; otherwise innocent action by a public official could assume criminal coloration under the Act simply by virtue of his office.[10]

The words "unlawfully attempt to affect commerce"

or "knowingly and wilfully demanding and obtaining" the alleged political contribution do not supply the key missing element of wrongful or corrupt use of office. There can be no crime against commerce unless there is a crime of official extortion. There is no such extortion unless facts are alleged which disclose a payment made and received either for, or in contemplation of, a wrongful or corrupt use of office. The mere allegation that the consent of Cosulich was "induced by [defendant] under color of official right" is not a substitute which expresses "without any uncertainty or ambiguity . . . all the elements necessary to constitute the offense intended to be punished." Hamling v. United States, supra, 94 S.Ct. at 2907. If the government has such facts, it should set them forth in the indictment. Without them it has no offense. 11

The defendant's motion to dismiss the indictment is granted.

SO ORDERED.

/s/ EDWARD R. NEAHER
U. S. D. J.

Dated: Brooklyn, New York
June 30, 1975

FOOTNOTES

[1] This is the third indictment brought against the defendant for the alleged violations of the Hobbs Act. The earlier ones, 74 CR 126 and 74 CR 552, were dismissed on the government's consent, following oral argument on defense motions to dismiss and the filing of superseding indictments. The Hobbs Act provides, where pertinent:

> "§1951. Interference with commerce by threats or violence
>
> "(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> "(b) As used in this section—
>
> * * * * *
>
> "(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

[2] 18 U.S.C. §1951(b)(2), supra n. 1.

[3] United States v. Braasch, supra, 505 F.2d at 151 n. 8 (holding this offense does not require proof of coercion); United States v. Crowley, supra, 504 F.2d at 995 n. 5 (holding the offense need not involve force or threat); United States v.

Kenny, supra, 462 F.2d at 1229 (holding proof of threat, fear or duress not required). See generally United States v. Staszcuk, supra, 502 F.2d at 877-78; Stern, Prosecutions of Local Political Corruption under the Hobbs Act: The Unnecessary Distinction Between Bribery and Extortion, 3 Seton Hall L. Rev. 1, 14-16 (1971).

[4] United States v. Staszcuk, supra, 502 F.2d at 883 (Campbell, J., concurring). See United States v. Sutter, 160 F.2d 754, 756 (7 Cir. 1947); Stern, supra n. 3, 3 Seton Hall L. Rev. at 15-17.

[5] United States v. Crowley, supra, 504 F.2d at 994-95; United States v. Kenny, supra, 462 F.2d at 1229. See United States v. Nardello, 393 U.S. 286, 289 (1969) ("At common law a public official who under color of office obtained the property of another not due either to the office or the official was guilty of extortion"). See generally authorities cited in United States v. Braasch, supra, 505 F.2d at 151 n. 8; United States v. Crowley, supra, 504 F.2d at 995 n. 4; 3 Wharton, Criminal Law §§1392, et seq. (Anderson ed. 1957); Stern, supra n. 3, 3 Seton Hall L. Rev. at 15-17.

[6] Gov't Mem. of Law at 9.

[7] Id. at 10.

[8] N.Y. Penal Law §155.05(2) (McKinney 1975) provides, where pertinent:

> "§155.05 Larceny; defined
>
> * * * * *
>
> "2. Larceny includes a wrongful taking, obtaining or withholding of another's property, with the intent prescribed in subdivision one of this section, committed in any of the following ways:

* * * * *

"(e) By extortion.

"A person obtains property by extortion when he compels or induces another person to deliver such property to himself or to a third person by means of instilling in him a fear that, if the property is not so delivered, the actor or another will:

* * * * *

"(viii) Use or abuse his position as a public servant by performing some act within or related to his official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely;"

9 Blackstone defined extortion as

"an abuse of public justice, which consists in any officer's unlawfully taking, by colour of his office, from any man, any money or thing of value, that is not due to him, or more than is due, or before it is due." 4 W. Blackstone, Commentaries 141 (1769).

The common law formulation in this country has been essentially the same. See 3 Wharton, supra, §1392.

10 See United States v. Kenny, supra, where the court approved the following instruction:

"Extortion under color of official right is the wrongful taking by a public officer of money not due him or his office, whether or not the taking was accomplished by force, threats or use of fear." 462 F.2d at 1229 (emphasis supplied).

11 The government argues that in a prior brief dealing with an earlier dismissed indictment, defense counsel cited the indictment in United States v. Palmiotti, 254 F.2d 491 (2 Cir. 1958), as a good example of a proper indictment. The implication is that this indictment meets that test. It clearly does not. In Palmiotti all the factual elements of a classic labor extortion case based on threats of violence were succinctly set forth, including the interference with interstate shipments of construction granite. Nothing of the sort is shown in this indictment.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 18th day of August, 1975, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a Appendix of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Lyon & Erlbaum, Esq.
123-60 83rd Avenue
Kew Gardens, N.Y. 11415

Evelyn Cohen

Sworn to before me this
18th day of August, 1975
Martha Scharf

MARTHA SCHARF
Notary Public, State of New York
No. 24-3480350
Qualified in Kings County
Commission Expires March 30, 1977